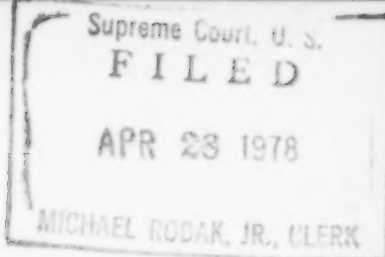


**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1977

No. ~~77-1~~553



COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS
OF THE COUNTY OF LOS ANGELES; and CIVIL SERVICE
COMMISSION OF THE COUNTY OF LOS ANGELES,

Petitioners,

vs.

VAN DAVIS, HERSHEL CLADY and FRED VEGA, individually
and on behalf of all others similarly situated, WILLIE C. BURSEY,
ELIJAH HARRIS, JAMES W. SMITH, WILLIAM CLADY,
STEPHEN HAYNES, JIMMIE ROY TUCKER, LEON AUBRY,
RONALD CRAWFORD, JAMES HEARD, ALFRED R. BALTAZAR,
OSBALDO A. AMPARAH, individually and on behalf of all
others similarly situated,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOHN H. LARSON
County Counsel

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Attorneys for Petitioners

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Wallace, J., Dissenting

APPENDIX B

Opinion of the United States Court of Appeals for the Ninth Circuit in "*Van Davis, et al. v. County of Los Angeles, et al.*" (Unreported)

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Findings of Fact and Conclusions of Law of the United States District Court, Central District of California, in "*Van Davis, et al. v. County of Los Angeles, et al.*"

IN THE
SUPREME COURT
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October Term, 1977
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COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS
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Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review
the judgment of the United States Court of Appeals for the
Ninth Circuit entered on this proceeding on December 14, 1977.

OPINION AND JUDGMENT BELOW

The opinion of rehearing (including dissent) of the
United States Circuit Court of Appeals for the Ninth Circuit is

printed as Appendix A, p. 1, and is reported in *Van Davis, et al. v. County of Los Angeles, et al.*, 566 F.2d 1334 (9th Cir. 1977). The unreported original opinion of the circuit court is printed as Appendix B. The judgment and findings of the district court are printed as Appendices C, and D, respectively.

JURISDICTION

The opinion and judgment were entered on December 14, 1977. A timely petition for rehearing was filed by the respondents, *Van Davis, et al.* (plaintiffs-appellants below), and was denied on January 30, 1978.

Jurisdiction of the District Court was based on 28 U.S.C. Sec. 1343.

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1), and Rule 19(1)(b).

QUESTIONS PRESENTED

1. Is proof of purposeful racial discriminatory intent required to establish a cause of action for employment discrimination under 42 U.S.C. Sec. 1981 or can an employer be held liable for pre-Title VII employment practices under Sec. 1981, merely by a showing of disproportionate impact.

2. Is a racial quota hiring order to be effective until the entire fire department achieves current racial parity with the general population beyond the jurisdiction of the court when:

a. The District Court expressly found no discriminatory intent was present;

b. The quota hiring order attempts to remedy hiring practices occurring prior to the effective date of Title VII and time barred by the applicable 3-year Statute of Limitations on Sec. 1981 actions;

c. The plaintiffs had no standing to represent any pre-March 24, 1972 applicants and no discriminatory hiring has occurred subsequent to Title VII's effective date.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The 5th and 14th Amendments to the United States Constitution; in particular, the due process and equal protection clauses thereof;

2. The following provisions of the United States Code:

42 U.S.C. Sec. 1981. Equal rights under the law:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like

3.

punishment, pains, penalties, taxes, licenses, and extractions of every kind, and to no other.

42 U.S.C. Sec. 2000e, et seq. (Title VII of the Civil Rights Act of 1964 as amended in 1972).

STATEMENT OF THE CASE

In this proceeding, the County of Los Angeles was found liable for employment discrimination under 42 U.S.C. Sec. 1981 and Title VII and ordered to engage in quota hiring of blacks and Mexican-Americans until the entire fire department of 1760 firefighters achieved racial parity with the County's general population, despite the existence of the following facts:

1. No discriminatory hiring occurred after the effective date of Title VII;
2. The trial court found that the County had not engaged in purposeful discrimination and, to the contrary, found that the County had engaged in efforts designed to increase minority representation in the fire department;
3. None of the plaintiffs had been applicants for any firefighter position prior to 1972, and the Ninth Circuit held that the plaintiffs lacked standing to challenge the County's use of qualification tests given at any time prior to 1972;

4. All plaintiff applicants taking the 1972 written exam passed, and all hiring from the resulting eligibility list was conceded by plaintiffs prior to trial to be accomplished in a non-discriminatory manner.

The plaintiffs in their complaint filed on January 11, 1973 challenged two written employment tests of the County of Los Angeles - one given in 1969 and the other in 1972. While also claiming the 5'7" minimum height standard was discriminatory, they expressly declined to seek an injunction against its use in both the district and circuit courts. None of the plaintiffs was disqualified by the minimum height standard. In an amended complaint the plaintiffs conceded that the hiring as a result of the 1972 test was not discriminatory. Ultimately the Ninth Circuit in the decision sought to be reviewed by this petition held that the plaintiffs had no standing to challenge the 1969 written tests or any hiring practices occurring before 1972. The following summarizes the proceedings in the case.

In July, 1973, the trial court found that petitioner County of Los Angeles had violated 42 U.S.C. Secs. 1981, 1983, and Sec. 2000e-16 (Title VII) by administering a written employment qualification test for entry-level firefighter in 1969, and January, 1972, which had an adverse effect on blacks and Mexican-Americans and was not shown to be job-related. The District Court upheld the departments 5'7" minimum

height standard. The court further found that neither the defendants nor their officials had engaged in employment practices with a wilfull or conscious purpose of excluding blacks and Mexican-Americans from employment, but to the contrary, had engaged in efforts designed to increase minority representation in the Fire Department. App. D, p. 4. As a remedy, the court ordered that the County hire all future entry-level firemen in accordance with a hiring quota of 20% black and 20% Mexican-American until such time as the percentage representation of those minorities in the entire Fire Department in all ranks equaled their representation in the County's general population.^{1/}

The only named plaintiffs in this case were individuals who had applied for and taken only the 1972 written examination and who were certified on a hiring list from that exam which was conceded by plaintiffs to have been prepared and utilized in a non-discriminatory manner. No individual who had been unsuccessful on the 1969 or any prior exam was named as a plaintiff, nor did the plaintiffs seek to represent such prior applicants, the complaint alleging that it was filed only on behalf of "blacks or Mexican-Americans" who are current or future applicants for employment as Los Angeles County Firemen. (Clerks Transcript, lines 20-24, p. 62.)

^{1/}

At the time of judgment, blacks and Mexican-Americans comprised 0.5% and 3% respectively of the Fire Department's firefighter personnel (approximately 1762) and 10.9 and 18.3% of the County's general population.

On appeal, the United States Court of Appeals for the Ninth Circuit, in its original decision, reversed the judgment under Sec. 1983 because the County was not a "person," and affirmed the judgment finding the County in violation of Sec. 1981. The court found no violation of Title VII because the tests administered in 1972 had not been implemented; that is, no civil service list was promulgated or hires made as a consequence of the test results. Nevertheless, the court ruled that Title VII standards were applicable to Sec. 1981 claims and that a violation of Sec. 1982 could be established merely by a showing that a hiring practice had a disparate effect on minorities and the employer was unable to validate the test as job-related. The circuit court reversed the trial court's judgment upholding petitioner's 5'7" minimum height standard and remanded for reconsideration of the quota.

Subsequent to its original decision, the Ninth Circuit, upon petitioner's request, granted a rehearing to determine, in light of this Court's recent decision in *Washington v. Davis*, 426 U.S. 229 (1976), whether proof of purposeful discriminatory intent is required for a violation of Sec. 1981. On rehearing, the Ninth Circuit (Judge Wallace dissenting) affirmed its original finding that there was no operational distinction between a cause of action based upon Title VII and Sec. 1981 and that the adverse impact standards evolving from Title VII cases were sufficient to establish liability under Sec. 1981. It was held that a showing of deliberate intent to discriminate was not a requirement under Sec. 1981 as it was under the United States Constitution,

as determined by this Court in *Washington v. Davis*. The Ninth Circuit, however, did rule that respondents lacked standing to represent prior unsuccessful applicants including those taking the 1969 test because the class did not include any prior unsuccessful applicants. *Van Davis, et al. v. County of Los Angeles, et al.*, 566 F.2d 1334 at 1338.

Judge Wallace dissented, being of the opinion that constitutional standards were applicable to proving discrimination under Sec. 1981 and noting that, even if it were otherwise, the quota hiring order was improper in view of the court's finding that respondents lacked standing to represent former applicants.

The written civil service test challenged in this litigation was administered to applicants for entry-level firefighter positions twice, once in 1969 and again in January 1972. The oral interview and physical agility portions of the examination process were not attacked because they had no disproportionate impact on minorities. The 1972 administered test was utilized only on a pass-fail basis with 97% of all applicants passing. As to these passing applicants, their subsequent oral interviews and physical examinations had no adverse impact.

The County of Los Angeles hired no firemen from well before March 24, 1972 (the effective date of Title VII) until the Spring of 1973, when the first recruit class was composed 50% of minorities (10 blacks and 20 Mexican-Americans).^{2/}

^{2/}

The respondents, in their first and second amended complaints, conceded that the hiring of this recruit class was done in a non-discriminatory manner (Clerks Transcript p. 62, lines 20-22).

All subsequent hiring has been pursuant to the trial court's 40% preferential minority hiring order of July, 1973. At no time was there any discriminatory hiring since March 24, 1972, or as a consequence of the 1972 written test.

The 1969 written exam as utilized in the hiring of new firefighters had an adverse impact on blacks and Mexican-Americans. The County, however, in the administration of the subsequent 1972 exam, initially intended (as ultimately occurred) to set the cutoff score extremely low so that 97% of the applicants passed, and then process through the oral interview and physical agility phases of the selection process approximately 500 of those applicants. These 500 would be chosen totally by random selection so that the minority applicant percentage which approximated their community representation would be maintained throughout the subsequent stages of the selection process which had shown no adverse impact.

A state lawsuit enjoined the proposed random selection and after a year's delay, the County, because of the pressing need for new firemen, initially contemplated interviewing the top 544 applicants on the 1972 written test. No such selection or interviews were ever commenced. Instead, all passing applicants were interviewed and hires were made in a non-discriminatory manner.

During the five-year pendency of the appeal, the petitioners observed and in most cases exceeded the quota hiring order and as of July, 1977 had hired as firemen recruits

267 persons, of which 158 (59.1%) were blacks or Mexican-Americans. Pursuant to the terms of the judgment the district court receives annual reports and retains jurisdiction over the case until the entire department reaches community racial parity.

REASONS FOR GRANTING THE PETITION

The reasons for granting the petition are:

1. An important question of federal law of great public importance should be settled by this court in order to harmonize the standards for discrimination under 42 U.S.C. Secs. 1981, 1983, and the United States Constitution. More specifically, are Title VII standards of presumptive discrimination (without a requirement of purposeful intent) applicable to actions under Sec. 1981 but not applicable to claims of discrimination under Sec. 1983 or the 14th Amendment to the United States Constitution?

2. The decision of the Ninth Circuit appears to be in conflict with an applicable decision of this court, to wit: *Washington v. Davis*, 426 U.S. 229 (1976).

3. The decision of the Ninth Circuit, ruling that purposeful discriminatory intent is not required for a cause of action under Sec. 1981, is in conflict with decisions of at least two other Courts of Appeal.

I

CONSTITUTIONAL, NOT TITLE VII,
STANDARDS OF DISCRIMINATION
SHOULD GOVERN CLAIMS UNDER
42 U.S.C. SEC. 1981; PURPOSEFUL
DISCRIMINATION IS THE CORRECT
CRITERION FOR ADJUDGING A
VIOLATION OF SEC. 1981.

A federal issue of extreme importance is created by the Ninth Circuit's holding that "[w]e cannot conclude that *Washington* embraced a ruling that a showing of disproportionate impact no longer will suffice to establish a prima facie case of employment discrimination under Sec. 1981. In our view, there remains no operational distinction in this context between liability based upon Title VII and Sec. 1981," *Van Davis v. County of Los Angeles*, 566 F.2d 1334 at 1340. The liability of the petitioner under Sec. 1981 was predicated solely upon a showing of adverse impact on minorities, the trial court affirmatively finding that no deliberate intent to discriminate was present. The application to Sec. 1981 of a presumption of discrimination based on adverse impact, originating from interpretations of Title VII, is incorrect, at variance with this Court's decision in *Washington v. Davis*, and has ramifications extending far beyond employment discrimination cases. Such a holding would:

1. Encompass non-employment discrimination actions brought under Sec. 1981 which, as this Court observed in *Washington v. Davis*, would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may have a disproportionate impact. This Court in *Washington v. Davis*, 426 U.S. 229 at 244-245, footnote 12, specifically rejected the application of Title VII presumption standards to those areas of government action;

2. Permit the procedural and statutory prerequisites and administrative enforcement procedures of Title VII to be circumvented by the mere allegation of a cause of action under Sec. 1981, thus opening the federal courts to a flood of litigation that Congress intended should be channeled through and reduced by the EEOC administrative machinery;

3. Create differing standards for proving discrimination between Secs. 1983 and 1981, although both statutes are premised on the protection of constitutional rights;

4. Negate the recent decisions of this Court and circuit courts of appeal in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Jones v. City of San Antonio*, 568 F.2d 1224 (5 Cir. 1978), which held that the extension of Title VII to governmental entities in March, 1972 was not retroactive and the decision in *United Air Lines v. Evans*, 431 U.S. 553 (1977), that a discriminatory act that has not been made the basis of a timely charge cannot constitute a present

violation of Title VII under the theory of a continuing effect of past discrimination.

The filing of a Title VII charge and resort to Title VII administrative machinery are not prerequisites for the institution of a Sec. 1981 action. *Johnson v. Ry Express Agency, Inc.*, 421 U.S. 454 (1975). Thus, Title VII administrative requirements could be easily circumvented merely by casting the complaint in the form of a Sec. 1981 action. Moreover, if Title VII standards of proof and liability are equally applicable to Sec. 1981 actions, there was little reason for Congress to extend Title VII to public entities in 1972.

The decision of the Ninth Circuit in the instant case, that the adverse impact standards enunciated in the Title VII case of *Griggs v. Duke Power* are perforce applicable to Sec. 1981 actions, is inconsistent with this Court's decision, in *Washington v. Davis, supra*, holding that they are not applicable to constitutional claims. Both Secs. 1981 and 1983 are statutes enacted to enforce constitutional rights and are not specifically employment discrimination statutes supported by the same congressional intent this Court ruled was present in the 1964 enactment of Title VII.

Section 1981 is a post-Civil War Reconstruction Era statute enacted in 1866 to enforce the 13th Amendment to the United States Constitution which prohibits involuntary servitude, and extends to others the same right to make and enforce contracts enjoyed by white citizens – that is, equal protection

of the laws. Section 1981 was subsequently reenacted as part of the Civil Rights Act of 1871, which was designed to implement the 14th Amendment.

Section 1981 prohibits racial distinctions in the terms of or in the right to make a contract. It does not incorporate the subtleties and rigorous standards relating to adverse impact and test validation that have evolved with the passage of Title VII and its subsequent interpretation by the courts and administrative agencies. Indeed, none of these concepts could have possibly been in the minds of the enactors of that statute in 1866.

The rationale enunciated by this Court in *Washington v. Davis*, with regard to constitutional protections against discrimination applies equally to Sec. 1981. Thus, if the employer deliberately discriminates in making an employment contract based on race, or specifies different terms and conditions thereof based solely on race, then those statutes as well as the United States Constitution have been violated. But this is clearly not what occurred in the instant case or in *Washington v. Davis*. In both instances, the same test was administered to all races and the same grading and scoring standards for determination of eligibility for appointment were applied equally and consistently to all races. The respondents have predicated their entire case solely upon showing an adverse impact and a claim that the defendants cannot prove the test to be job-related -- evidentiary principles that have evolved *solely* from Title VII decisions.

In addition to disagreeing with the application of the *Griggs* standard in previous employment discrimination cases under Secs. 1981-1983, this Court in *Washington v. Davis* expressly ruled it inapplicable to constitutional discrimination claims in other contexts. Racial discrimination cases not involving employment have been and will continue to be brought under Sec. 1981 as well as Sec. 1983 and the Constitution. There is nothing in the legislative history of Sec. 1981 which suggests that liability is to be premised merely upon a showing of disproportionate impact or that employment cases are to be accorded special treatment or be subject to different standards of proof than other civil rights cases brought under that statute.

Title VII, however, is a statute with a unique legislative history intended to deal specifically with employment discrimination, and its adverse impact standard has evolved through subsequent judicial interpretations premised on the seminal case of *Griggs v. Duke Power Co.* It is rightly accorded different standards and methods of proof as distinguished from Secs. 1981, 1983, and the Constitution. Proof of intentional discrimination, however, should be the consistent standard applicable to claims under Sec. 1981 as well as Sec. 1983 and the United States Constitution.

II

THE DECISION IS CONTRARY TO THE
SUPREME COURT'S RULING ON THE
INTENT STANDARD FOR CONSTITU-
TIONAL DISCRIMINATION IN
WASHINGTON V. DAVIS AND ITS
DECISION ON STANDING IN *EAST*
TEXAS MOTOR FREIGHT V. RODRIGUEZ

In *Washington v. Davis, supra*, This Court ruled that the standard for adjudicating claims of racial discrimination under Title VII was not the same standard for adjudicating such claims under the Constitution. Although the complaint in *Washington* alleged a cause of action under Sec. 1981 as well as the Constitution, the Court did not specifically refer to Sec. 1981 in its opinion. The rationale behind the Court's decision, however, would appear equally applicable to actions under Sec. 1981 because that statute, like Sec. 1983, was intended to provide statutory protection to constitutional rights and, while originating in the Civil Rights Act of 1866, was reenacted with Sec. 1983 as part of the Civil Rights Act of 1871. This Court in footnote 12 of *Washington* disagreed with a long line of earlier employment discrimination cases brought under both Secs. 1983 and 1981 applying Title VII standards of proof.

A few days after deciding *Washington v. Davis*, this Court vacated the judgment and remanded the case of *Chicano Police Officers Association v. Stover*, 426 U.S. 944 (1976), an action brought under Sec. 1981 and Sec. 1983 but

not Title VII, for reconsideration in light of the opinion in *Washington v. Davis*. In *Chicano Police Officers Association*, the Tenth Circuit Court, similarly to the Ninth Circuit in the instant case, had concluded that the measure of a claim under the Civil Rights Acts of 1866 and 1871 was the same as that applicable to Title VII cases. In view of the district and circuit court express findings of adverse impact and lack of job relatedness, remand would not have been necessary if Title VII standards were, in fact, applicable to Sec. 1981 claims, regardless of the effect of *Washington v. Davis* on the Sec. 1983 claim. It should be apparent that because Sec. 1981 has been held to apply to a wide range of equal protection cases, congruent with those actionable under Sec. 1983 and the Constitution, this Court's holding in *Washington v. Davis*, distinguishing claims under Title VII from those under the Constitution, is subject to circumvention in most equal protection cases by the simple expedient of alleging a claim under Sec. 1981. Since Sec. 1981 is applicable in every case in which constitutional claims of employment discrimination based on race are asserted, the Supreme Court's decision on employment discrimination in *Washington v. Davis* would be rendered essentially meaningless.

III

THE OPINION OF THE NINTH CIRCUIT IS IN CONFLICT WITH OTHER CIRCUIT COURT OPINIONS

The Courts of Appeals of the Tenth, Sixth, Seventh, and Eighth Circuits have all held that purposeful intent is

required to prove a cause of action under Sec. 1981. Numerous District Courts have reached the same conclusion.^{3/} With the exception of the Ninth Circuit in the instant case, no Circuit Court subsequent to *Washington v. Davis* has ruled that Title VII standards not requiring proof of discriminatory intent are applicable to actions under Sec. 1981.

The Tenth Circuit, upon remand in *Chicano Police Officers Assn. v. Stover*, 552 F.2d 918 (March 2, 1977), construed this Court's purposeful intent ruling in *Washington v. Davis* as pertaining to claims under Sec. 1981, and remanded the case to the district court for a determination of whether such intent existed.^{4/} The Sixth Circuit in *Arnold v. Ballard*, 12 EPD par. 11, 224 (1976), a suit brought under Sec. 1981, Sec. 1983, and the U.S. Constitution, vacated their previous decision and

^{3/} *Lewis v. Bethlehem Steel Corp.*, 440 F.Supp. 949, 963 (1977).

United States v. State of So. Carolina, ___ F.Supp. ___, 15 FEP Cases 1196 (1977), (3-judge panel that included two circuit judges).

Crocker v. Boeing Co., 437 F.Supp. 1138 (1977).

Veizaga v. National Board of Respiratory Therapy, 13 EPD par. 11, 525, 6878, 6881 (N.D. Ill., January 27, 1977).

^{4/} The circuit court's opinion stated:

"[T]he error in our holding and the views expressed by us is clear. We stated that we agreed . . . with the view that the measure of a claim under the Civil Rights Act is in essence that applied to a suit under Title VII of the Civil Rights Act of 1964. 526 F.2d at 438, 11 FEP Cases at 1061. This was contrary to the principle holding that came in *Washington v. Davis*, *supra*, at 238, 12 FEP Cases at 1418. All of our reasoning and treatment of the case which proceeded from the erroneous standard must be corrected." *Supra*, at 920.

remanded the case to the district court for reconsideration in light of *Washington v. Davis*. Upon remand the District Court recently concluded that purposeful discriminatory intent was required under Sec. 1981 and expressly declined to follow the Ninth Circuit's opinion in the case at bar, relying instead upon the reasoning of Judge Wallace's dissent (Memorandum Decision and Order, C73-478, Mar. 14, 1978).

The Seventh Circuit in two recent cases appears to have concluded that a showing of racially discriminatory purpose is required to establish a violation of Sec. 1981. In *United States v. City of Chicago*, 549 F.2d 415 (1977), the court affirmed liability only under Title VII and reversed the district court's judgment on all other grounds, including Sec. 1981, because of the failure to meet the intentional discrimination standard. In *City of Milwaukee v. Saxbe*, 546 F.2d 693, 705 (1976), the same court held that the burden in Sec. 1981 cases is the same as the constitutional burden under the Fifth Amendment.

The Eighth Circuit most recently in *Johnson v. Alexander*, ___ F.2d ___, 16 FEP Cases 894 (8th Cir., February 17, 1978), affirmed a district court judgment which, in reliance on *Washington v. Davis*, found *inter alia* that the protection against racial discrimination under Secs. 1981, 1983 does not extend beyond the equal protection guarantees of the Fifth and Fourteenth Amendments to the Constitution, and that since the challenged Army regulation^{5/} was not adopted

^{5/}

Army Reg. 40-501, par. 2-34(a), disqualifies prospective enlistees who have had "frequent encounters with law enforcement agencies or antisocial attitudes or behavior." The Plaintiff, a black, contended that disclosure of arrest records had an adverse impact on minorities.

with any discriminatory intent, it did not violate Sec. 1981 simply because in operation it bore harder on minority groups than whites. The Eighth Circuit specifically rejected appellant's contention that Title VII standards should be applied to plaintiff's Sec. 1981 claim.

The Fifth Circuit in *Harkless v. Sweeny Independent School District*, ___ F.2d ___, 14 EPD, par. 7669, 5295 (1977), held that Sec. 1981 requires a showing of purposeful discrimination. In accord was their decision in *Wade v. Mississippi Cooperative Extension Service*, 528 F.2d 508, 518 (1976).

IV

THE AFFIRMED QUOTA HIRING ORDER CLEARLY EXCEEDS THE COURT'S REMEDIAL AUTHORITY.

The instant case was brought on behalf of the 1972 and future applicants, not one of which proved he had been discriminatorily denied a job. The Circuit Court held that respondents had no standing to represent any applicants prior to the 1972 exam, and as to the hiring resulting from the 1972 examination process, the respondents conceded that it had been done in a nondiscriminatory manner. With no post-Title VII discriminatory hiring proven, it is clear that despite their lack of standing the respondents were challenging pre-Title VII hiring practices. The quota order they sought and obtained was solely intended to provide a remedy only for pre-Act hiring. It was affirmed by the appellate court totally absent

a showing of discriminatory intent, and necessarily on the theory that it remedied a violation of Sec. 1981 as no post-Title VII discriminatory hiring had occurred. Assuming, *arguendo*, that discriminatory intent is not required for a cause of action under Sec. 1981, the quota order nevertheless is in excess of the court's jurisdiction because of the respondents' lack of standing as well as the sweeping scope of the order requiring the entire department achieve racial parity.

The petitioners' uneffectuated proposal to interview the top 544 applicants on the 1972 written test cannot form the basis of a violation of Title VII, much less justification for an order requiring racial parity in the entire work force. A violation of Title VII requires proof of a pattern and practice of discrimination. Isolated incidents, even if effectuated, are insufficient to establish liability under that statute. *Hazelwood School District v. United States*, ___ U.S. ___, 97 Sup.Ct. 2736, 15 FEP Cases 1 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 14 FEP Cases 1514 at 1519 (1977).

Quota hiring orders unrelated to the injury established are not within the remedial power of the court. The respondents in this action, suing only on behalf of present and future applicants, did not establish that any of their number had been discriminatorily refused a job. The proposal to interview the top 544 candidates had no impact on the departmental composition as no hires were made as a result of such proposal and the

interviews were not restricted to the top 544 persons.

The decision of the Circuit Court affirming the quota hiring order disregards the applicable statute of limitations on Sec. 1981 claims,^{6/} ignores this court's ruling in the *United Airlines v. Evans*, 431 U.S. 553 (1977), that past discriminatory acts not the subject of a timely complaint have no present legal consequences, and, to the extent Title VII is even applicable, purports to retroactively remedy acts occurring before its March 24, 1972, effective date.^{7/} It is clear that the majority misconstrued the decision in *United Airlines v. Evans* in their holding at page 1344, footnote 20, that time-barred claims may be remedied retroactively.

Within the past two years, this Court has in several opinions expressly declined to extend Title VII remedies retroactive to the Act's effective date, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324; *Franks v. Bowman*, 424 U.S. 747 (1976). In *Teamsters*, and particularly in *Hazelwood School District v. United States*, *supra*, this Court clearly distinguished between pre and post-Title VII hiring practices, observing that the employer must be given an opportunity to

^{6/}

The applicable Statute of Limitations is three years. See *Mills v. Small*, 446 Fed.2d 249 (1971).

^{7/}

Indeed, unless one assumes that *all* of the 1760 firefighters on the force had been hired in the eight years immediately preceding the lawsuit, the quota order seeks to remedy unproven discrimination occurring even before the original enactment of the Title VII in 1964.

show the claimed discriminatory pattern was a product of pre-Act hiring rather than unlawful post-Act discrimination. This necessarily implies not only a time limitation on Title VII standards of proof, but also limitations on the reach of judicially imposed remedies.

The Ninth Circuit's decision establishes an unjustified dichotomy between injunctive (preferential hiring) relief and other accepted remedies, such as back pay and retroactive seniority which have been consistently held to be limited in scope by the applicable statute of limitations or the effective date of Title VII and similar employment discrimination statutes. *Franks v. Bowman, supra*; *International Brotherhood of Teamsters v. United States, supra*. Back pay awards in Sec. 1981 employment discrimination suits have been held to be limited to the applicable 3-year Statute of Limitations period preceding the filing of the action. *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5 Cir. 1974).

The quota ruling has consequences extending far beyond the impact on the parties herein. It, of course, effectively makes Title VII retroactive, reduces the administrative filing requirements of Title VII to meaningless technicalities, and provides a remedy for time-barred claims. Moreover, it permits federal trial courts, on the most tenuous of grounds, to issue quota orders requiring parity of the employer's work force with the current community ethnic representation.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the Petition for Writ of Certiorari herein.

Executed this 26th day of April, 1978, at Los Angeles, California.

Respectfully submitted,

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County Counsel

WILLIAM F. STEWART

Chief, Labor Relations Division

Attorneys for Appellants

APPENDIX A



Van DAVIS et al., Plaintiffs-Appellants,

v. -

COUNTY OF LOS ANGELES et al., etc.,
Defendants-Appellees.

Van DAVIS et al., Plaintiffs-Appellees,

v.

COUNTY OF LOS ANGELES et al., etc.,
Defendants-Appellants.

Nos. 73-3008 and 73-3009.

United States Court of Appeals,
Ninth Circuit.

Dec. 14, 1977.

Rehearing Denied Jan. 30, 1978.

Affirmed in part, reversed in part and
remanded.

Wallace, Circuit Judge, dissented with
an opinion.

Before TUTTLE,* HUFSTEDLER and
WALLACE, Circuit Judges.

TUTTLE, Circuit Judge:

This Court entered its original opinion in
this case on October 20, 1976. The Court

* Honorable Elbert P. Tuttle, Senior United States
Circuit Judge, Fifth Circuit, sitting by designa-
tion.

1. The plaintiff class also included all present
and future black and Mexican-American em-
ployees of the Fire Department, who alleged
racial discrimination in connection with de-
fendants' promotion practices. These addition-
al allegations, however, were abandoned prior
to trial.

thereafter granted defendants-cross-appel-
lants' motion for rehearing, and the case
was regularly set down for rehearing and
oral argument. Although the principal ba-
sis for the rehearing motion was the Su-
preme Court's decision in *Washington v.
Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48
L.Ed.2d 597 (1976), the parties were permit-
ted to brief and argue all other issues as
well.

We now withdraw the original opinion
and decision, and this opinion and decision
are announced in their stead.

This suit was brought on behalf of all
present and future black and Mexican-
American applicants for positions as fire-
men with the Los Angeles County Fire De-
partment,¹ alleging that the defendants Los
Angeles County, the County Board of Su-
pervisors and the County Civil Service Com-
mission had been guilty of racial discrimina-
tion in hiring in violation of the Fourteenth
Amendment, 42 U.S.C. §§ 1981, 1983 and
Title VII of the Civil Rights Act of 1964, 42
U.S.C. § 2000e et seq.²

The district court found that the Los
Angeles County Fire Department employed
blacks and Mexican-Americans grossly out
of proportion to their number in the popula-
tion of Los Angeles County. The court
further found that the Fire Department,
despite its admitted knowledge of its prior
discriminatory practices and its bad reputa-
tion as an employer in the minority commu-
nity, failed to undertake any effective posi-
tive steps to eradicate the effects of prior
discrimination. Accordingly, the court or-
dered accelerated hiring of racial minorities
in a ratio of one black and one Mexican-
American applicant for each three white
applicants until the effects of past discrimi-
nation had been erased.³

2. Jurisdiction was based on 28 U.S.C. § 1343.

3. Data introduced by the plaintiffs showed that
this 1-1-3 ratio, given the present rate of hir-
ing, would produce a work force of minority
firemen in proportion to the number of minori-
ty persons in the community by 1979 for blacks
and 1983 for Mexican-Americans.

Despite the fact that the Mexican-American population of Los Angeles County was approximately double the size of the black population, the district court ordered identical accelerated hiring for both groups due to its finding that the Fire Department's 5'7" height requirement for job applicants was a valid requirement for employment and that this height requirement had the effect of eliminating 41% of the otherwise eligible Mexican-American applicants from consideration.

The plaintiffs appeal the trial court's finding that the 5'7" height requirement is valid and could therefore be used in limiting the relief available to the Mexican-American members of the plaintiff class. The defendants cross-appeal the trial court's order of accelerated hiring. We affirm the district court's finding of a current violation of the rights of members of this class by the improper post-1971 use of an unvalidated written test as a selection device for entry level positions and its order of accelerated hiring to cure past racial discrimination; we disagree with the court's findings that plaintiffs have standing to challenge defendants' pre-1971 use of an unvalidated written test as a selection device and that the 5'7" height requirement has been sufficiently validated by the defendants. Accordingly, we reverse and remand for reconsideration of the proper ratio of accelerated racial hiring to be ordered.

I. Written Examination Procedures

[1] Despite a minority population of approximately 29.1% in Los Angeles County, only 3.3% of the firemen employed by the defendants at the time of trial were black or Mexican-American. Plaintiffs alleged,

and the trial court found, that this severe racial imbalance resulted in part from the defendants' utilization of unvalidated written examinations to rank applicants for positions as firemen. The defendants do not, and indeed cannot, dispute that these verbal aptitude tests, administered to applicants in August 1969 and in January 1972, had a discriminatory impact on minority applicants. Of the 244 blacks who took the 1969 examination, 5 were hired; of the 100 Mexican-Americans, 7 were hired, while of the 1080 whites taking the test, 175 were hired. Thus, while approximately 25% of the 1969 applicants were black or Mexican-American, based on the results of this test only 6.4% of the hires were minorities. Black and Mexican-American applicants fared no better on the 1972 examination. Specifically, while 25.8% of the white applicants were among the top 544 scorers on the test, only 5.1% of the black applicants were included in that group. Applying the now-familiar standards announced in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), the district court concluded that such statistical data alone established a prima facie case of racial discrimination in employment, thereby shifting the burden to the defendants to establish that the tests were job-related.⁴ We agree that defendants failed to satisfy their burden.⁵

Defendants have challenged the plaintiffs' standing to complain of the use of the unvalidated 1969 written test. In light of the fact that plaintiffs' class did not include any prior unsuccessful applicants, it follows that plaintiffs neither suffered nor were threatened with any injury in fact from the use of the 1969 examination. No firemen were hired on the basis of success on this

4. The cases holding that statistics alone may prove a prima facie case of employment discrimination, thereby shifting the burden to the defendants to justify the racial imbalance, are by this time legion. See, e.g., *United States v. Masonry Contractors Ass'n of Memphis, Inc.*, 497 F.2d 871, 875 (6th Cir. 1974); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 225 (5th Cir. 1974); *United States v. N. L. Indus., Inc.*, 479 F.2d 354, 368 (8th Cir. 1973); *United States v. Hayes Int'l Corp.*, 456 F.2d 112, 120

(5th Cir. 1972); *United States v. Ironworkers Local 86*, 443 F.2d 544, 550-51 (9th Cir.), cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971).

5. Defendants conceded that no studies establishing the validity of the written employment tests have been conducted in accordance with "professionally acceptable methods." See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

test after plaintiffs became applicants in October 1971. The parties stipulated that approximately 100 vacancies occur in the ranks of firemen each year, and testimony at trial established that 187 applicants were placed on an eligibility list following the 1969 test. Based on these facts, we must conclude that the 1969 list was depleted before plaintiffs applied for employment as firemen.

[2] In the absence of a statute expressly conferring standing, it is well settled that in order to have standing a plaintiff must suffer some actual or threatened injury as a result of the alleged unlawful conduct. *See, e.g., Linda S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-67, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972); *Flast v. Cohen*, 392 U.S. 83, 101, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); *Baker v. Carr*, 369 U.S. 186, 204-208, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). It is thus clear that plaintiffs lacked standing to challenge defendants' prior use of the test in 1969.⁶

6. Our holding on this point makes it unnecessary to discuss defendants' contention that the recent decision in *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977), precludes plaintiffs from attacking the defendants' pre-1971 hiring procedures.

It is equally clear that defendants' decision to employ the 1972 written test as a selection device was an unlawful employment practice which had adverse impact on the racial class of plaintiffs. The plaintiffs thus have standing to litigate the lawfulness of the 1972 test.

7. Only four other Courts of Appeals have had occasion to apply or construe the decision in *Washington*. The Court of Appeals for the D.C. Circuit has stated that a plaintiff proceeding under Title VII and § 1981 need not show the type of purposeful or intentional discrimination required to establish a violation of the Equal Protection Clause. *Kinsey v. First Regional Securities, Inc.*, 557 F.2d 330 (D.C. Cir. 1977) (dictum).

In *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977), the court reversed the trial court's finding that the defendants' written examination violated the Fourteenth Amendment solely because the plaintiffs failed to satisfy the purposeful discrimination requirement of *Washington*. *Id.* at 435. The *City of Chicago* plaintiffs also had alleged that the examination violated § 1981, and defendants here contend that the appeals court equated § 1981 with the

As previously indicated, the district court reached the conclusion that defendants' use of unvalidated written examinations was an illegal employment practice through application of the principles announced in *Griggs*, a Title VII case. Subsequent to trial on the merits in this case, the Supreme Court in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), held that to establish a prima facie case of unconstitutional employment discrimination, discriminatory intent or purpose must be shown rather than or in addition to a statistical showing of disproportionate impact. Defendants interpret *Washington* to require similar proof in cases alleging employment discrimination under § 1981. Accordingly, defendants urge us to reverse the decision of the district court, since no showing was made that defendants administered the 1972 examination with any intent or purpose to discriminate against minority applicants. The issue presented is one of first impression in this Circuit.⁷ We have

Fourteenth Amendment for purposes of determining the burden of proof applicable to non-Title VII actions. The *City of Chicago* court, however, made no mention of § 1981 in reversing the district court's ruling but specifically held that the defendants' hiring and promotion policies "did not violate the Constitution." *Id.* (emphasis added).

In *Chicano Police Officer's Ass'n v. Stover*, 526 F.2d 431 (10th Cir. 1975), an employment discrimination action alleging violations of the Equal Protection Clause, §§ 1981, 1983 and 1985, the court held that "the measure of a claim under the Civil Rights Act is in essence that applied in a suit under Title VII" *Id.* at 438. (citations omitted). Subsequently, the Supreme Court granted certiorari, vacated the judgment and remanded for reconsideration in light of *Washington v. Davis*. *Stover v. Chicano Police Officer's Ass'n*, 426 U.S. 944, 96 S.Ct. 3161, 49 L.Ed.2d 1181 (1976). Defendants here argue that had the Supreme Court intended the adverse impact rule of Title VII to apply to § 1981 actions after *Washington*, the Court simply would have denied certiorari in *Stover* and allowed the judgment to stand on the basis of a violation of § 1981 alone. However, neither the district court nor the court of appeals in *Stover* ever found that defendants had violated § 1981. Further, it is clear that the Supreme Court's action was necessitated by the court of appeal's failure to distinguish causes of action under §§ 1981 and 1983 in

carefully reviewed the Court's opinion in *Washington* and the post-*Washington* cases brought to our attention by the parties. We must reject defendants' argument.

The primary controversy in *Washington* involved the validity of a qualifying test—"Test 21"—administered to persons seeking employment with the D.C. Metropolitan Police Department. The plaintiffs alleged that Test 21 excluded a disproportionately high number of black applicants in violation of their rights under the Due Process Clause of the Fifth Amendment, 42 U.S.C. § 1981 and § 1-320 of the D.C. Code. 426 U.S. at 233, 96 S.Ct. 2040. Following various preliminary proceedings before the trial court, plaintiffs moved for partial summary judgment on their constitutional claim alone. Defendants also moved for summary judgment, asserting that plaintiffs were entitled to relief on neither constitutional nor statutory grounds. The district court, after finding that plaintiffs' statistical showing of disproportionate impact established a prima facie case of discrimination, concluded that Test 21 was "reasonably and directly related to the requirements of the police recruit training program." *Davis v. Washington*, 348 F.Supp. 15, 17 (D.D.C. 1972). Accordingly, the court granted defendants' and denied plaintiffs' motions. *Id.* at 18.

On appeal, plaintiffs argued that their summary judgment motion, which rested on purely constitutional grounds, should have been granted. The Court of Appeals for the D.C. Circuit agreed and reversed. *Davis v. Washington*, 168 U.S.App.D.C. 42, 512 F.2d 956 (1975). Announcing that it would be guided in its decision by the Title VII standards formulated in *Griggs*, the appeals

court agreed that plaintiffs' statistical showing alone, without proof of a purpose on the employer's part to discriminate, made out a prima facie case, shifting the burden of proof to the defendants. 168 U.S.App.D.C. at 47, 512 F.2d at 961. In light of the district court's finding of a nexus between Test 21 and future success in police training school, the court then identified the "ultimate issue" to be "whether that kind of proof [was] an acceptable substitute" for the job-relatedness showing required by *Griggs*. *Id.*, 168 U.S.App.D.C. at 48-49, 512 F.2d at 962-63. Concluding that it was not, the court directed that plaintiffs' motion for partial summary judgment be granted and the defendants' motions denied.

The Supreme Court reversed, concluding that plaintiffs "were entitled to relief on neither constitutional nor statutory grounds." *Washington v. Davis*, 426 U.S. 229, 248, 96 S.Ct. 2040, 2052, 48 L.Ed.2d 597 (1976). Mr. Justice White prefaced Part II of the majority opinion with this statement: "Because the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it, we reverse" *Id.* at 238, 96 S.Ct. at 2046 (emphasis added). In holding that proof of racially discriminatory intent or purpose is required to show an equal protection violation, the Court disavowed ever having ruled that "a law or other official act . . . is unconstitutional solely because it has a racially disproportionate impact." *Id.* at 239, 96 S.Ct. at 2047. It is significant that throughout this discussion of "constitutional standards" and "Constitution-based claims,"⁸ the Court mentioned neither

equating the "Civil Rights Act" and Title VII. And although the case was eventually remanded to the district court, *Chicano Police Officer's Ass'n v. Stover*, 552 F.2d 918 (10th Cir. 1977), the issue before this Court was not expressly decided.

Finally, in *Arnold v. Ballard*, 12 E.P.D. ¶ 11,224 (6th Cir. 1976) (per curiam), the court vacated an earlier decision and remanded for reconsideration in light of *Washington*. The per curiam opinion, however, did not discuss the

issue now before us and did not explain the rationale underlying the court's decision.

8. The language used by the Court clearly indicates that Part II of the opinion was directed solely toward claims of unconstitutional employment discrimination. The following passages are illustrative: (1) "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical" to the Title VII standards. 426 U.S. at 239, 96 S.Ct. at 2047 (emphasis added); (2) "This is not to say . . . that a law's dis-

§ 1981 nor cases construing that statute.⁹ Nor can it be said that in resolving the equal protection question before it, the Court necessarily resolved the § 1981 claim on the same basis.

[3] During recent history, every court which has considered the question has construed § 1981 to bar discrimination in employment. See *Long v. Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974); *Macklin v. Spector Freight Sys., Inc.*, 156 U.S.App.D.C. 69, 478 F.2d 979 (1973); *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Brown v. Gaston County Dyeing Mach. Co.*, 457 F.2d 1377 (4th Cir.), cert. denied, 409 U.S. 982, 93 S.Ct. 319, 34 L.Ed.2d 246 (1972); *Young v. International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971); *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), cert. denied, 401 U.S. 948, 91 S.Ct. 935, 28 L.Ed.2d 231 (1971); *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 427 F.2d 476 (7th Cir.), cert. denied, 400 U.S. 911, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970). The courts consistently have employed Title VII principles as a benchmark not only in cases involving alleged discriminatory impact, see *Wade v. Mississippi Coop. Extension Serv.*, 528 F.2d 508, 516-17 (5th Cir. 1976); *King v. Yellow Freight Sys., Inc.*, 523 F.2d 879, 882 (8th Cir. 1975); *Kirkland v. New York State Dept. of Correctional Servs.*, 520 F.2d 420, 425 (2d Cir. 1975), cert. denied, 429 U.S. 823, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976); *Barnett v. W. T. Grant Co.*, 518 F.2d 543, 549 (4th Cir. 1975), but in other contexts as well. See, e. g., *Flowers v. Crouch-Walker*

proportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination." *Id.* at 241, 96 S.Ct. at 2048 (emphasis added); (3) "Disproportionate impact is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." *Id.* at 242, 96 S.Ct. at 2049 (emphasis added); (4) "We are not disposed to adopt [the] more rigorous [Title VII] standard for the purposes of applying the Fifth and the Fourteenth Amendments" *Id.* at 247-48, 96 S.Ct. at 2051 (emphasis added).

9. Defendants contend that the Washington majority "specifically refer[red] to several § 1981 cases and note[d] their disagreement with the appellate court's reliance upon the Title VII standards of proof." The Court did note its

Corp., 552 F.2d 1277, 1281 & n. 3 (7th Cir. 1977) (discriminatory discharge of employee); *McCormick v. Attala County Bd. of Educ.*, 541 F.2d 1094, 1095 (5th Cir. 1976) (per curiam) (available remedies). Indeed, the Supreme Court has recognized that Title VII and § 1981 embrace "parallel or overlapping remedies against discrimination." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 & n. 7, 94 S.Ct. 1011, 1019, 39 L.Ed.2d 147 (1973). In the absence of any express pronouncement from the Supreme Court—a pronouncement not delivered in *Washington*—we are unwilling to deviate from this established practice. Any unnecessary deviation not only could produce undesirable substantive law conflicts, see *Waters v. Wisconsin Steel Works of Int. Harvester Co.*, 502 F.2d 1309, 1316 (7th Cir. 1974), cert. denied, 425 U.S. 997, 96 S.Ct. 2214, 48 L.Ed.2d 823 (1976), but also would dilute what has been a potent remedy for the ills of countless minority employees subjected to the unlawful discriminatory conduct of their employers. Thus, we cannot conclude that *Washington* embraced a ruling that a showing of disproportionate impact no longer will suffice to establish a prima facie case of employment discrimination under § 1981.¹⁰ In our view, there remains no operational distinction in this context between liability based upon Title VII and § 1981.

[4, 5] The defendants further argue that the district court lacked jurisdiction under either §§ 1981 or 1983 to decide these

disapproval of several cases but explained that it was in disagreement only "to the extent that those cases rested on or expressed the views that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation." 426 U.S. at 245, 96 S.Ct. at 2050 (emphasis added). Furthermore, each case cited in this context involved, in addition to a § 1981 claim, a claim under either the Equal Protection Clause or § 1983.

10. Accord, *League of Latin American Citizens v. City of Santa Ana*, 410 F.Supp. 873 (C.D.Cal. 1976). But see *Ortiz v. Bush*, 14 F.E.P. Cases 1019 (D.Colo. 1977); *Johnson v. Hoffman*, 424 F.Supp. 490 (E.D.Mo. 1977); *Resident Advisory Bd. v. Rizzo*, 425 F.Supp. 987 (E.D.Pa. 1976).

claims. As to § 1983, the defendants are clearly correct. A municipality is not a "person" suable under § 1983,¹¹ and thus the three municipal defendants are not subject to suit under § 1983. See *City of Kenosha v. Bruno*, 412 U.S. 507, 511-13, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973); *Monroe v. Pape*, 365 U.S. 167, 187-92, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Since no individual defendants were named in this suit, the plaintiffs' § 1983 claim is barred.¹² Section 1981, however, is not subject to the same jurisdictional limitations. See *Sethy v. Alameda County Water Dist.*, 545 F.2d 1157 (9th Cir. 1976) (en banc).

[6, 7] In summary, we believe the district court properly found defendants' use of the 1972 written examination as a selection device to be a violation of § 1981. Plaintiffs produced overwhelming statistical data to establish the test's disproportionate impact upon minority applicants, and the defendants were unable to validate the test in terms of job-relatedness.¹³ Defendants' decision, prompted solely by the filing of this lawsuit, to abandon the written exam as a selection device does not moot the claim. *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-33, 73 S.Ct. 894, 97 L.Ed. 1303 (1953)¹⁴.

11. 42 U.S.C. § 1983 provides:

"Every person who, under color of any statute . . . of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." (emphasis added)

12. Individuals may be sued in their official capacity. See *Sterzing v. Fort Bend Independent School Dist.*, 496 F.2d 92, 93 n. 2 (5th Cir. 1972); *United Farmworkers of Florida Housing Project, Inc. v. City of Del Ray Beach*, 493 F.2d 799, 802 (5th Cir. 1974); *Harper v. Kloster*, 486 F.2d 1134, 1138 (4th Cir. 1973). As the plaintiffs did not allege federal question jurisdiction under 28 U.S.C. § 1331, their Fourteenth Amendment claim does not stand apart from their § 1983 claim. Although it should be clear, we also note that since no purposeful or intentional discrimination by the defendant was proved, plaintiffs' Fourteenth Amendment and § 1983 causes of action could not have been sustained under *Washington*.

II. The 5 Foot, 7 Inch Height Requirement

Among the other of defendants' practices challenged by the plaintiffs was the 5'7" height requirement. In *Dothard v. Rawlinson*, — U.S. —, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977), the Supreme Court held that Title VII forbids the use of height requirements which have discriminatory effect unless the employer meets "the burden of showing that [the] requirement [has] . . . a manifest relation to the employment in question." *Id.* at 2726, quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

[8] Here there can be no question that the 5'7" height requirement has discriminatory impact. The parties stipulated that 41% of the otherwise eligible Mexican-American applicants are excluded by the requirement.¹⁵ The defendants further conceded that no scientifically approved test has been utilized to determine whether the height requirement is in fact job-related. The only testimony in the record on point is that of Chief Stanley E. Barlow, himself only 5'8", who testified that he believed a small man might have difficulty

13. In Part III of the opinion in *Washington v. Davis*, the majority agreed with the district court's conclusion that Test 21 had been sufficiently validated by a validation study and other evidence showing a nexus between success on the test and success in police training school. 426 U.S. at 250-51 & n. 17, 96 S.Ct. 2040. It is at least arguable that by not requiring the defendants to meet the job-relatedness standards of Title VII, the Court implicitly held that employers sued under § 1981 may escape liability by showing something less than job-relatedness. We need not address that question here, since defendants' proof not only is insufficient under *Griggs*, but also falls far short of the quality and quantity of proof offered in *Washington*.

14. Of course, this continued threat to use the 1972 test as part of the selection process right up to the filing of the complaint in this case is admittedly a violation of Title VII.

15. We accordingly note that the continuing use of this height requirement constitutes a continuing violation of Title VII and provides a basis for relief in addition to § 1981.

working with taller men in removing long ladders and other equipment and might have a slower reaction time in climbing on and off equipment. Chief Barlow conceded that in the past firemen under 5'7" have been able to function without impairment due to their height.¹⁶

[9] It seems clear to us that this testimony falls far short of validating a height requirement which has a serious impact in restricting Mexican-American employment in the County Fire Department.¹⁷ The district court did not have the benefit of *Dothard*, *supra*, and, therefore, did not apply the standard of proof required by that case. The evidence introduced was inadequate to meet the *Dothard* requirement that the height restriction was manifestly related to employment by the Fire Department. Accordingly, the district court's finding of job-relatedness must be reversed.

III. Affirmative Relief

[10] The defendants contest the affirmative relief ordered by the district court. However, as this Court has noted,

"[t]here can be little doubt that where a violation of Title VII is found, the court is vested with broad remedial power to remove the vestiges of past discrimination and eliminate present and assure the non-existence of future barriers to the full enjoyment of equal job opportunities by qualified black workers."

United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9th Cir.), *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971) (citations omitted). We do not believe the court lacks equal power under § 1981 to order relief. Indeed, "[i]n fashioning an appropriate remedy for employment discrimination, Congress has granted courts plenary equitable power under both Title VII . . . and section 1981." *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d

211, 243 (5th Cir. 1974) (footnotes omitted). Although the decided cases have primarily involved either Title VII or § 1983, and not § 1981, we feel the extensive case law under both sections approving affirmative relief is directly applicable here. We see no reason to limit the relief available under § 1981 merely because in the past § 1981 and Title VII have been read in tandem. See, e. g., *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975); *Franks v. Bowman Transp. Co.*, 495 F.2d 398 (5th Cir. 1974) *modified*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974). Similarly, we note that Title VII and § 1983 cases frequently have been cited as involving analogous principles in fashioning equitable relief, see *Rios v. Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622, 628 (2d Cir. 1974); *Carter v. Gallagher*, 452 F.2d 315, 329 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972), and cases involving one statute have been cited in support of the relief ordered in cases involving the other.

Eight Courts of Appeals, including this one, have considered and approved the use of accelerated hiring goals or quotas to eradicate the effects of past discrimination. See *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975) (§§ 1981 & 1983, Title VII); *Rios v. Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974) (Title VII); *United States v. Masonry Contractors Ass'n of Memphis, Inc.*, 497 F.2d 871 (6th Cir. 1974) (Title VII); *Franks v. Bowman Transp. Co.*, 495 F.2d 398 (5th Cir. 1974), *modified*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (Title VII); *Morrow v.*

16. These shorter firemen were employed during World War II when the standard was relaxed, and when firemen of other cities automatically joined the L.A. County Fire Department when their employing cities were annexed by L.A. County.

17. Our earlier comments with respect to validation of employment criterion challenged under § 1981 are equally applicable in this context. See note 15, *supra*.

Crisler, 491 F.2d 1053 (5th Cir.) (en banc), cert. denied, 419 U.S. 895, 95 S.Ct. 173, 42 L.Ed.2d 139 (1974) (§ 1983); *Vulcan Society v. Civil Serv. Comm'n*, 490 F.2d 387 (2d Cir. 1973) (§ 1983); *Associated Gen. Contractors of Mass., Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974) (Title VII); *Bridgeport Guardians, Inc. v. Civil Serv. Comm'n*, 482 F.2d 1333 (2d Cir. 1973) (§§ 1981, 1983); *United States v. N.L. Indus., Inc.*, 479 F.2d 354 (8th Cir. 1973) (en banc) (§ 1983); *Pennsylvania v. O'Neill*, 473 F.2d 1029 (3d Cir. 1973) (en banc) (§ 1983); *United States v. Local 212, IBEW*, 472 F.2d 634 (6th Cir. 1973) (Title VII); *United States v. Wood Lathers Local 46*, 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973) (Title VII); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972) (§ 1983); *United States v. Carpenters Local 169*, 457 F.2d 211 (7th Cir.), cert. denied, 409 U.S. 851, 93 S.Ct. 63, 34 L.Ed.2d 94 (1972) (Title VII); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971) (en banc), cert. denied, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972) (§ 1983); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971) (Title VII); *Contractors Ass'n of Eastern Pa. v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971) (Title VII); *United States v. Local 38, IBEW*, 428 F.2d 144 (6th Cir.), cert. denied, 400 U.S. 343, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970) (Title VII); *Local 53, Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969) (Title VII).¹⁸ While the defendants argue § 703(j) of Title VII forbids the imposition of racial quota hiring, even were this to be an order premised solely on Title VII, we note this view has been uniformly rejected by the many courts which have considered the question.

[11] We believe the district court properly exercised its discretion in ordering affirmative action to be undertaken to erase

the effects of past discrimination. We do not believe that such relief may be limited to the identifiable persons denied employment in the past—for "the presence of identified persons who have been discriminated against is not a necessary prerequisite to ordering affirmative relief in order to eliminate the present effects of past discrimination." *Carter v. Gallagher*, 452 F.2d at 330.

Nor are remedial goals limited to any specific or prescribed form. The precise method of remedying past misconduct is left largely to the broad discretion of the district court. Goals have been expressed in terms of specific numbers or ratios . . . or percentages . . .

Rios v. Steamfitters Local 638, 501 F.2d at 631 (citations omitted).

While we remand because the district court expressly stated that the reason it ordered identical accelerated hiring of blacks and Mexican-Americans in equal ratios was because of the validity of the 5'7" height requirement, we do not necessarily believe a 1-1-3 ratio was incorrect. The court, however, should reconsider its order in light of our decision that the 5'7" height requirement is invalid and that plaintiffs lacked standing to challenge defendants' use of the 1969 written examination.

[12] The defendants finally argue that the imposition of an affirmative order to hire minority applicants is unnecessary. They argue in effect that they have already commenced and that they can be relied upon further to improve their hiring practices without the added impetus of a court order. The experience of the Court of Appeals for the Fifth Circuit is useful in this regard—"protestations or repentance and reform aimed to anticipate or blunt the force of a lawsuit offer insufficient assurance that the practices sought to be enjoined will not be repeated." *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972); accord, *United States v. Oregon State Medical Soc'y*, 343 U.S. 326, 333, 72 S.Ct. 620, 96 L.Ed. 978 (1952). Here the

within the facts of that case as not being an abuse of discretion.

18. *Harper v. Kloster*, 486 F.2d 1134 (4th Cir. 1973) did not hold to the contrary, but upheld the district court's refusal to impose quotas

record shows that the defendants had decided to use an unvalidated verbal aptitude test to hire new candidates in 1973 and that the only reason the test was not used was notice of this suit. The personnel director of the defendants testified at length at the trial and acknowledged that he was aware of the discriminatory impact such a test would have. Further, the trial judge found that defendants had failed and refused to take necessary affirmative steps to overcome the department's bad reputation in black and Mexican-American communities. We emphasize that this was not a close case—in a community of 29.1% minority population, only 3.3% of the firemen employed by defendants were black or Mexican-American. These factors are hardly persuasive evidence of the defendants' good faith, even were such good faith relevant in fashioning relief.¹⁹ We agree with the district court that an accelerated hiring order is the only way "to overcome the presently existing effects of past discrimination within a reasonable period of time."

In sum, we believe the district court was wholly justified in deciding to impose affirmative hiring orders upon the defendants.²⁰

While it should be obvious to all, we nevertheless repeat the admonition that nothing said by this Court is to be taken as a requirement that the defendants hire any unqualified applicant for the performance of these essential jobs.

AFFIRMED in part, REVERSED in part and REMANDED for further proceedings not inconsistent with this opinion.

WALLACE, Circuit Judge, dissenting:

I respectfully dissent.

Discrimination in employment based upon race, creed or color is a practice inconsistent with the views and aspirations of nearly all Americans and clearly repugnant to the

principles upon which our society is built. But even in rooting out such an evil practice, we are bound by certain procedural and jurisdictional limitations which may serve to protect the rights of others.

I think it is clear from the record that the plaintiffs' challenges to two of the three allegedly illegal employment practices are barred by such a jurisdictional limitation. The majority concedes that the named plaintiffs have no standing to attack the defendants' pre-1971 hiring procedures. I agree. I believe it equally plain that they lack standing to challenge the height limitation.

As to the remedy, I conclude that while the plaintiffs may well have standing to challenge the post-1971 hiring procedures, there is a critical issue as to whether the imposition of minority hiring quotas is now warranted given the limited scope of this issue and the circumstances under which the defendants' objectionable conduct occurred. Because the district court imposed quotas based on conduct which in large part has been rejected by the majority as a basis for remedial action, the district judge may well now believe that mandatory quotas are no longer appropriate. Because the question should be resolved in the first instance by the trial judge, I would reverse and remand for reconsideration of the appropriate remedy in light of the limited standing of the plaintiffs and the nature of the defendants' conduct within the new, limited time frame adopted by the majority in this case.

I. The Height Limitation

As an initial matter, it is clear to me that the issue of the 5'7" height limitation was never properly before the district court. The issue comes to us by a curious route. The plaintiffs phrase their request for relief as follows:

91 S.Ct. at 854. We believe good faith is equally inapplicable to § 1981.

19. In *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), a Title VII case, the Supreme Court rejected good faith as a defense. "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." *Id.* at 432.

20. We do not read *United Air Lines v. Evans*, 431 U.S. 553, 97 S.Ct. 1855, 52 L.Ed.2d 571 (1977) to restrict in any way the affirmative relief ordered in this case.

The only modification of the Judgment sought in this appeal is an increase of the Mexican-American hiring ratio, such increase to be ordered if there is a reversal by this Court of Appeal of the District Court's conclusion of law that the height standard is job-related and legal. Plaintiffs-appellants did not seek below and do not seek on this appeal, an order enjoining the use of the 5'7" height standard.

Since the plaintiffs do not contest the legality of the height limitation, I do not see how the district judge erred in taking the height limitation into account in fashioning the remedy.

But even assuming the height limitation is properly at issue, the parties before us do not have standing to pursue it. None of the named plaintiffs is alleged to be shorter than 5'7". To the contrary, it has been stipulated that all of the named plaintiffs are present employees or presently on an eligibility list. Since one of the requirements is a minimum height of 5'7", each of them must be at least that tall. Consequently, none of them have suffered an injury-in-fact from the alleged discriminatory practice. In addition, since the class was certified as "all present and future . . . Mexican-American applicants,"

some of whom will surely be less than 5'7" tall, the named plaintiffs cannot properly represent them because their interests are potentially antagonistic. Fed.R.Civ.P. 23(a)(3), (4). Indeed, applicants 5'7" or taller have an interest in limiting the number of their competitors by retaining the height requirement. This may be the reason why the plaintiffs did not ask that the height limitation be enjoined but merely now seek a larger hiring quota for Mexican-Americans in spite of it. These facts amply demonstrate the need for and the protection built into standing requirements. Although this lack of standing is obvious, it is not even discussed by the majority.

II. *The Pre-1971 Examination Procedures*

The villain of the pre-1971 examination procedures was a discriminatory written test used as a ranking device. All hiring was done from an eligibility list which was the final product of an examination process. The process began with the written test and a physical agility test and the top scorers were then selected for oral interviews. A total score was given each applicant, with the discriminatory written test having a 35 percent weighted value. The highest ranking candidates were certified for placement on the eligibility list from which vacancies were filled. When the list was exhausted, which usually happened in about two years, a new examination process would begin in order to produce a new eligibility list.

The district court held that the plaintiffs made out a prima facie case of employment discrimination by proving that at the time the complaint was filed in 1973, only 3.3 percent of the firemen employed by the defendants were black or Mexican-American despite the fact that those minorities accounted for approximately 29.1 percent of the population of Los Angeles County.¹ These employment statistics are necessarily the result of the defendants' pre-1971 hiring practices since no firemen were hired thereafter until the complaint was filed. But the majority admits that the plaintiffs lacked standing to challenge these practices. Consequently, the pre-1971 practices were entitled to only a narrowly restricted role in the fashioning of the remedy in this case, as explained in part III. C. below.

III. *The Post-1971 Examination Procedures*

A. *The Facts*

Prior to accepting applications for a new examination procedure in 1971, the entire procedure was changed. Since the named plaintiffs' applications were processed under these new procedures, they clearly have standing to litigate their legality. Given the limited scope of the claim, however, I

1. The district court found that 10.8 percent of the population of Los Angeles County was black and 18.3 percent Mexican-American.

question the appropriateness of the sweeping injunctive relief granted.

The new procedures were to be as follows. Written tests were to be eliminated as a ranking device, but because of the large number of applicants (3500) and the relatively few job openings (33), some method had to be adopted to limit the number of applicants interviewed. Thus a new written test was designed in an attempt to eliminate cultural bias. The test was to be given and graded on a pass-fail basis for the sole purpose of screening out illiterates. Five hundred of the passing applicants were to be selected at random for oral interviews. This method eliminated the written test as a ranking device and gave every passing applicant an equal opportunity to be chosen for an oral interview. Ninety-seven percent of the applicants passed the written test; 1,885 were white, 170 black and 283 Mexican-American. The passing applicants were to be ranked solely on the basis of the results of the physical agility test and the oral interviews.

The new written test was administered in 1972, but before the random selection could be made, a lawsuit was filed in state court against the county, charging that the random selection process violated provisions of the county charter and civil service regulations requiring that selection for oral interviews be made on merit. The county was enjoined from using this method pending trial on the merits. As a result, the examination process was halted for over two years and no interviews or physical tests were given and no eligibility list was certified.

As vacancies increased, the county fire department urged that the applicants who by this time had been waiting for almost 18 months, be interviewed and an eligibility list certified. In desperation, the county Department of Personnel proposed to interview those applicants who had received the top 544 scores on the 1972 written test. Of this number, 492 were white, 10 black and 33 Mexican-American. These applicants were not to be ranked on the basis of the test results, however, and the interviews

were not intended to eliminate the remaining applicants from consideration. The purpose was solely to expedite the hiring of sufficient firemen to meet the immediate, urgent requirements of the fire department.

The plaintiffs herein objected to this proposal. Upon learning of the complaint about to be filed in this action, the Director of Personnel abandoned the plan and implemented a new procedure whereby all of the passing applicants would be interviewed. The interviews commenced on January 20, 1973.

The plaintiffs filed this civil rights action naming as defendants the County of Los Angeles, the Board of Supervisors of the county and the Civil Service Commission. The complaint alleged racial discrimination in violation of 42 U.S.C. §§ 1981 and 1983; it was later amended to invoke Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.* as well. The defendants completed interviewing all of the applicants by the end of March 1973 and certified an eligibility list. Of the top 315 applicants on this list, 210 were white, 39 black, 59 Mexican-American and 7 of other races (a total of 33.5 per cent "minorities"). It was conceded by the plaintiffs that this examination and ranking procedure did not have a discriminatory impact on blacks and Mexican-Americans.

At the conclusion of the trial, the district court specifically found that the defendants had not interfered with affirmative action efforts designed to increase black and Mexican-American participation rates and that, to the contrary, several officials had engaged in efforts designed to increase minority representation in the fire department. The court further found that neither the defendants nor their officials had engaged in employment practices with a willful or conscious purpose of excluding blacks and Mexican-Americans from employment.

The court concluded, however, that the defendants had engaged in the discriminatory employment practice of utilizing as a selection device non-validated written tests that had a disproportionate detrimental im-

fact on blacks and Mexican-Americans. This evidently included the defendants' short-lived intent to interview only the top 544 scorers on the 1972 examination. This, of course, is the *only* examination procedure of which the plaintiffs may complain since they lack standing to challenge all previous examinations.

B. Liability for the Attempted Use of the 1972 Examination

In deciding that the attempted use of the 1972 written examination was illegal, the majority relies almost exclusively upon 42 U.S.C. § 1981. Only in a footnote is it mentioned that this same conduct also constitutes a Title VII violation.² I agree with the majority that under *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-33, 73 S.Ct. 894, 97 L.Ed. 1303 (1953), the defendants' decision, prompted by the commencement of this lawsuit, not to use improperly the 1972 examination as a selection device, does not shield them from liability. But I would base that liability on Title VII, not section 1981. The majority's extensive discussion of section 1981 is not only incorrect, but in this case it is wholly unnecessary.

The district judge found as a matter of fact that "neither the defendants nor their officials had engaged in employment practices with a willful or conscious purpose of excluding blacks and Mexican-Americans from employment." Since a *prima facie* case under Title VII clearly does not require proof of an improper purpose when a discriminatory impact is alleged, *Griggs v.*

Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), this finding does not put defendants beyond the reach of Title VII.

The majority's decision that section 1981 similarly requires no proof of intentional discrimination is both unnecessary and unfortunate. The potential scope of section 1981 is exceptionally broad, going far beyond the Title VII realm of employment, and conceivably reaching virtually all private contractual arrangements. See *Runyon v. McCrary*, 427 U.S. 160, 168-71, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). Since the relief available under Title VII is extensive enough to include the remedy approved by the majority in this case,³ the wiser course would be to base the finding of liability on that statute and to wait for a more appropriate opportunity to consider the reaches of section 1981. Since the majority does choose to rely upon section 1981, however, I wish to make it clear that I cannot accept its easy conclusion that a *prima facie* case under that statute does not require proof of discriminatory intent.

The majority asserts that the Supreme Court's opinion in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), does not address the question of whether cases brought under section 1981—like those brought directly under the Fourteenth Amendment—always require proof of discriminatory intent, or whether—as in Title VII cases—proof of discriminatory impact alone may be sufficient.⁴ I agree. But *Washington v. Davis* serves at least to

viding a legitimate basis for some relief to the plaintiffs.

2. Even if they had had proper standing, the plaintiffs could not have attacked defendants' pre-1972 procedures under Title VII since that statute first became applicable to state public employers on March 24, 1972. Since a stipulation states that the defendants abandoned their plan to make a discriminatory use of the 1972 exam on January 8, 1972, Title VII is arguably unavailable to the plaintiffs as a basis of liability in this case. In that event, and in light of the subsequent analysis in the text, the defendants would be absolved of all liability whatsoever. It appears, however, that the stipulated date may be in error, and in addition it seems to me that a persuasive argument can be made that the threat to use the 1972 examination in a discriminatory manner can fairly be construed as continuing after March 24, 1972, thus pro-

3. "[T]he remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981" *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459, 95 S.Ct. 1716, 1719, 44 L.Ed.2d 295 (1975), quoting H.R. Rep. No. 92-238, 92nd Cong., 1st Sess. 19 (1971).

4. As the majority notes in footnote 7 of its opinion, few courts have had occasion to construe section 1981 in light of *Washington v. Davis*. Of those which have dealt with the issue explicitly, most have done so without analysis, e. g., *Kinsey v. First Regional Securi-*

remind us that improper intent may be an essential ingredient in some discrimination cases where the lower courts have heretofore thought otherwise. When it is necessary to decide such cases on the basis of authority other than Title VII or the Fourteenth Amendment, therefore, a most careful reconsideration of the role of discriminatory intent is in order.

The majority reasons that because both Title VII and section 1981 apply to employment discrimination cases, because the remedies available under these two statutes are "parallel or overlapping," *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 & n.7, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), and because *Washington v. Davis* does not decide that intentional discrimination is required under section 1981, "there remains

ties, Inc., 557 F.2d 830, 838 n.22 (D.C.Cir.1977), or under the assumption, rejected by us today, that *Washington v. Davis* did decide the section 1981 question. *E.g., League of United Latin Am. Citizens v. City of Santa Ana*, 13 FEP Cases 1019-20 (C.D.Cal.1976). The only post-*Washington v. Davis* cases I have located that shed any light on the problem support the position taken in this dissent. *Crocker v. Boeing Co.*, 437 F.Supp. 1138 (E.D.Pa.1977); *Johnson v. Hoffman*, 424 F.Supp. 490, 493-94 (E.D.Mo. 1977).

Significantly, the Supreme Court vacated and remanded the Tenth Circuit's decision in *Chicano Police Officer's Ass'n v. Stover*, 526 F.2d 431 (10th Cir. 1975), cert. granted, vacated, and remanded, 426 U.S. 944, 96 S.Ct. 3161, 49 L.Ed.2d 1181 (1976), in which it was held that "the measure of a claim under the Civil Rights Act [*i.e.*, section 1981 *et seq.*] is in essence that applied in a suit under Title VII of the Civil Rights Act of 1964." 526 F.2d at 438. *Stover* did not involve Title VII, but turned on sections 1981, 1983, and 1935, suggesting that the Supreme Court may well believe that constitutional standards apply in section 1981 cases. This is the interpretation placed on the Supreme Court's action by the Tenth Circuit panel that originally decided *Stover*, as evidenced by their treatment of the case on remand. *Chicano Police Officer's Ass'n v. Stover*, 552 F.2d 918, 920 (10th Cir. 1977).

5. The majority's analysis is not helped by the string of citations offered in support of the propositions that section 1981 has been applied "to bar discrimination in employment," and that Title VII principles are a "benchmark" in discrimination cases. The burden of these cases is that section 1981 provides a cause of action for private acts of employment discrimination and that it was not implicitly repealed

no operational distinction in this context between liability based upon Title VII and section 1981." This analysis is inadequate.⁵

That both statutes can apply to the same facts and that both may afford similar remedies is beside the point. The same can be said of Title VII and the Fourteenth Amendment, yet, after *Washington v. Davis*, there remains an essential "operational distinction" between them. The proper inquiry is whether the legislative history of section 1981 indicates that it *should* track the Fourteenth Amendment's standards of proof rather than those of Title VII. I believe that the history of section 1981 strongly suggests precisely that.

Because section 1981 is peculiarly linked to the Fourteenth Amendment, the stan-

by Title VII. I do not disagree. If any of these decisions arguably imply that section 1981 and Title VII are equivalent with respect to the required elements of a *prima facie* case, it should be noted that all but two of them were rendered prior to *Washington v. Davis*, and of those, none offers any analysis of the critical issue of discriminatory intent which the opinion in that case revived as a major factor in discrimination law. The two post-*Washington v. Davis* decisions, *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277 (7th Cir. 1977) and *McCormick v. Attala County Bd. of Educ.*, 541 F.2d 1094 (5th Cir. 1976), make no reference to *Washington v. Davis* or to the issues it discussed. Thus, none of these cases contributes much to the resolution of the issue at hand.

Actually, one of the Fifth Circuit cases relied upon by the majority, *Wade v. Mississippi Coop. Extension Serv.*, 528 F.2d 508 (5th Cir. 1976), undermines the majority's position. *Wade* specifically rejected the lower court's application to section 1981 of "the standard of proof established by the regulations implementing Title VII" and held that "[u]nder the law of this circuit, . . . public employment tests are to be judged under a constitutional standard in suits brought under 42 U.S.C.A. §§ 1981, 1983." *Id.* at 518 (emphasis added). The court in *Wade*, although it had the foresight to recognize that *Washington v. Davis*, then pending before the Supreme Court, could affect its understanding of the issues in the case before it, *id.* at 518 n.7, unavoidably lacked the wisdom later supplied by *Washington v. Davis* that purposeful discrimination is one element of the constitutional standard. But of interest here is the Fifth Circuit's recognition that section 1981 tracks the Constitution, not Title VII, in its standards of proof.

dards pertaining to that amendment should also control section 1981. Of course, Title VII also depends in part upon the Fourteenth Amendment for its validity.⁶ Title VII, however, was intentionally structured to rest upon as many other constitutional bases as possible.⁷ It is otherwise with section 1981. Section 1981 originated in two earlier statutes: section 1 of the Civil Rights Act of 1866, 14 Stat. 27, and section 16 of the Voting Rights Act of 1870, 16 Stat. 144. *Runyon v. McCrary*, *supra*, 427 U.S. at 168-70 n.8, 96 S.Ct. 2586. The 1866 Act is generally regarded as a "Thirteenth Amendment statute," see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422, 437-38, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), but it has also been found to rely upon the Fourteenth Amendment. In fact, part of the motivation behind the congressional support of the Fourteenth Amendment was to eliminate doubts about the constitutionality of the 1866 Act. *Id.* at 436, 88 S.Ct. 2186. The

second root of section 1981, section 16 of the Voting Rights Act of 1870, is clearly a "Fourteenth Amendment statute," *Runyon v. McCrary*, *supra*, 427 U.S. at 195-202, 96 S.Ct. 2586 (White, J. dissenting); its legislative history demonstrates that its precise purpose was to implement the congressional powers created by that Amendment. *Id.*

The significance of this is that section 1981 enjoys a unique historical and conceptual relationship to the Fourteenth Amendment which is not shared by Title VII.⁸ Consequently, it is quite proper to assume, absent a contrary holding by the Supreme Court, that the standards for establishing a prima facie case of discrimination under section 1981 and the Equal Protection Clause of the Fourteenth Amendment should be the same: there must be proof of discriminatory intent.

Other factors reinforce this conclusion. Interpreting section 1981 to require discriminatory intent is consistent with the Su-

6. E.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447-48, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) (1972 amendments to Title VII rely upon Fourteenth Amendment). With respect to section 1981, see subsequent text.

7. In his June 19, 1963 message to Congress, President John Kennedy submitted a proposed bill which developed into the Civil Rights Act of 1964 and which contained the embryo of what is now Title VII. The proposed bill was expressly made to rely upon

the exercise by Congress of the powers conferred upon it to regulate the manner of holding Federal Elections, to enforce the provisions of the fourteenth and fifteenth amendments, to regulate commerce among the several States, and to make laws necessary and proper to execute the powers conferred upon it by the Constitution.

H.R.Doc. No. 124, 88th Cong., 1st Sess. 14 (1963). That the present version of Title VII rests on more than the Civil Rights Amendments may also be seen in the deliberate inclusion of interstate commerce concepts in Title VII's definitions, signifying a reliance upon the Commerce Clause. 42 U.S.C. § 2000e(b)-(e), (g) & (h). Cf. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 249-50, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (Title II of Civil Rights Act of 1964 valid under the Commerce Clause).

Several courts of appeals, including our own, have found that Title VII extends beyond the reach of the Equal Protection Clause. E.g., *Berg v. Richmond Unified School Dist.*, 528

F.2d 1208, 1212 n.8 (9th Cir. 1975), cert. granted, 429 U.S. 1071, 97 S.Ct. 806, 50 L.Ed.2d 788 (1977); *Satty v. Nashville Gas Co.*, 522 F.2d 850, 855 (6th Cir. 1975), cert. granted, 429 U.S. 1071, 97 S.Ct. 806, 50 L.Ed.2d 788 (1977); *Communications Workers v. American Tel. & Tel. Co.*, 513 F.2d 1024, 1031 (2d Cir. 1975), cert. granted, vacated and remanded, 429 U.S. 1033, 97 S.Ct. 724, 50 L.Ed.2d 744 (1977). Although the holdings in these cases that the exclusion of pregnant women from certain insurance and other employment benefits have been undermined or put in doubt by *General Elec. Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), the *Gilbert* decision itself does not question the idea that Title VII invokes congressional powers beyond those derived from the Fourteenth Amendment. Rather, *Gilbert* simply holds that the exclusion of pregnancy benefits from an employer's disability insurance plan does not constitute a sex-based discrimination capable of invoking either Title VII or the Fourteenth Amendment. *Id.* at 136, 97 S.Ct. 401.

8. As *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), makes clear, section 1981 is also very closely tied to the Thirteenth Amendment. *Washington v. Davis* did not decide whether discriminatory intent is required in Thirteenth Amendment cases. I think that it is, but any uncertainty in this assumption merely underscores that the majority's decision to delve into section 1981 is unwise.

preme Court's statement in *Jones v. Alfred H. Mayer Co.*, *supra*, that Congress intended section 1 of the Civil Rights Act of 1866—the source of what is now section 1982 as well as one source of section 1981—“to prohibit all racially motivated deprivations of the rights enumerated in the statute . . .” *Id.* 392 U.S. at 426, 88 S.Ct. at 2196 (emphasis partly added). That racial motivation was originally meant by Congress to be a requirement in actions under the 1866 Act is further suggested by section 2 of the Act which imposes criminal penalties upon anyone who, under color of law, deprives another of the rights protected by section 1 “by reason of his color or race.” 14 Stat. 27.⁹

In addition, there are practical reasons for requiring proof of discriminatory intent in section 1981 cases, but not in Title VII cases. Title VII is part of a complex statute; together with its accompanying administrative regulations it identifies with particularity the conduct it proscribes and imposes a course of administrative remedies that must be exhausted before the jurisdiction of the courts may be invoked. 42 U.S.C. § 2000e-5; 29 C.F.R. §§ 1601.1 *et seq.* Because these barriers tend to eliminate claims that are frivolous or suffering from obvious legal or factual defects, it is not unreasonable to provide that a *prima facie* case may be established without a showing of discriminatory intent.

Section 1981 is a very different statute. Its language is both brief and sweeping in scope, and it does not have the screening mechanism provided by a requirement of the exhaustion of administrative remedies. The section 1981 screening mechanism, as in actions proceeding directly under the Fourteenth Amendment, is the required demonstration of discriminatory intent.

9. In addition, the original draft of the 1866 Act, as introduced by Senator Trumbull of Illinois, prohibited “discrimination in civil rights or immunities . . . on account of race, color, or previous condition of slavery . . .” *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 288, 96 S.Ct. 2574, 2582, 49 L.Ed.2d 493 (1976) (emphasis added).

10. In *Washington v. Davis*, the plaintiffs did plead section 1981. The defendants here argue

Indeed, because section 1981 can probably be invoked in a great many cases brought directly under the Fourteenth Amendment, the consequence of judicially creating a less demanding standard for section 1981 than for the Fourteenth Amendment might often be to circumvent the holding in *Washington v. Davis* altogether. In the vast array of cases such as the one before us now and *Washington v. Davis* itself, where Title VII does not apply but Section 1981 and the Fourteenth Amendment do, one could easily avoid the intent requirement of the Amendment by simply pleading section 1981.¹⁰ See *Croker v. Boeing Co.*, 437 F.Supp. 1138 (E.D.Pa. 1977).

Finally, an observation made by the Supreme Court in *Washington v. Davis* is relevant here. The Court was concerned about the problems that might arise if the Fourteenth Amendment could be invoked upon a mere showing of disproportionate racial impact:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.

that in that decision section 1981 was implicitly held to require a showing of discriminatory intent. The plaintiffs argue that the opposite implication exists. Both sides have a certain logical basis, but a close reading of the Supreme Court's opinion convinces me, as it does the majority, that *Washington v. Davis* simply does not consider the standards governing section 1981.

426 U.S. at 248, 96 S.Ct. at 2051 (footnote omitted) Section 1981, extending as it does far beyond "the field of public employment" to the expansive realm of both public and private contractual relationships, might well precipitate many of these same consequences if proof of discriminatory intent is not required.

For these reasons I would base defendants' liability for the use of the 1972 examination on Title VII alone. The majority's reliance on section 1981 is ill-advised because it is both unnecessary and incorrect.

C. The Scope of the Remedy

Even if the plaintiffs have established a Title VII violation with respect to the defendants' use of the 1972 written test results, however, that violation does not necessarily justify the imposition of minority hiring quotas on the defendants. The use of quotas must be carefully weighed. As the Supreme Court stated in *Griggs v. Duke Power Co.*, *supra*, 401 U.S. at 430-31, 91 S.Ct. at 853:

Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to

discriminate on the basis of racial or other impermissible classification.

In this case the trial judge ordered that 20 percent of all newly-hired firemen be black and that 20 percent be Mexican-American, compared to the respective proportions of those minorities in the population of 10.8 percent and 18.3 percent. Imposition of this hiring quota may well result in discrimination against equally or better qualified applicants solely on account of their race. Here, for example, a native American Indian, Asian-American, Hungarian-American or Polish-American may not be hired in order to provide a job for a black or Mexican-American. While quotas are sometimes necessary to correct past discrimination against certain groups, the possible prejudicial effects upon others must be weighed carefully by the district court.¹¹

In civil rights cases, "[a]s with any equity case, the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971). *Accord*, *Milliken v. Bradley*, 418 U.S. 717, 744, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). In fashioning remedies under Title VII, it is therefore essential to identify accurately the nature of the violations that have occurred. Here, the district judge believed he had properly found the defendants liable not only for their thwarted attempt to use the 1972 exam results in a discriminatory manner, but also for their use in earlier years of the examinations which actually produced the racial imbalance in the fire department's work force. It is obvious that the quotas were imposed to remedy that racial imbalance,¹² and thus that in

11. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976) (section 1981 and Title VII prohibit racial discrimination in private employment against white persons as well as against nonwhites). *Cf. Franks v. Bowman Transp. Co.*, 424 U.S. 747, 780-81, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (Burger, C. J., concurring and dissenting) (white employees injured by award of retroactive seniority to nonwhites may petition for equitable relief on their own behalf); *Weber v. Kaiser Alum. & Chem. Corp.*, 415 F.Supp. 761 (E.D.La.1976) (Title VII prohibits discrimination against white employees; private employment context).

I agree, of course, that equitable relief to rectify past discrimination will often impose burdens on those innocent of any discriminatory activity. *Franks v. Bowman Transp. Co.*, *supra*, 424 U.S. at 773-79, 96 S.Ct. 1251. But, as I explain in the subsequent text, relief appropriate to the violation in this case requires the imposition of no such burdens.

12. In his conclusions of law, the district judge stated:

[I]t appears that unless the Court orders accelerated hiring at the Los Angeles County Fire Department, there will not be sufficient hiring of blacks and Mexican-Americans as is necessary to overcome the presently existing

devising his hiring order, the district judge relied heavily upon his conclusion that the defendants were liable for their use of the pre-1972 examinations. For the reasons that follow, this reliance was misplaced.

The majority concedes that none of the defendants' examination procedures except the aborted attempt to use the 1972 exam results in a discriminatory manner were properly before the district court. I agree. The complete absence of standing on the part of any plaintiff to contest the earlier procedures makes them legally indistinguishable from the act described in *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), which could have been, but was not, properly brought before a federal court:

A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

Id. at 558, 97 S.Ct. at 1889.¹³ Therefore, the district court was not entitled to treat the pre-1972 examination procedures as substantive violations to be corrected, but only as "relevant background" to the narrow issues properly before him.

Moreover, even if the pre-1972 examinations could be properly considered by the district judge as background, their relationship to the defendants' Title VII violation militates against taking them heavily into

effects of past discrimination within a reasonable period of time
(Emphasis added).

13. It is not only the standing issue that made it improper for the district court to rely upon the pre-1972 procedures in fashioning its remedial order, but also the fact that even a plaintiff with standing could probably not have shown them to be illegal. Since Title VII first became applicable to the defendants on March 24, 1972, liability for the defendants' conduct previous to that date must be evaluated under

account. The remedial obligation of the district court was first and foremost to grant relief for the violations of law properly found to exist. It is true that judicial remedies sometimes attempt to correct past discrimination as well, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), but this is because present violations often "operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs v. Duke Power Co.*, *supra*, 401 U.S. at 430, 96 S.Ct. at 853.

The Title VII violation in this case had no such effect. Both the majority and I agree that the defendants are liable for nothing more than devising a plan—never carried out—which would have had a discriminatory impact. The plaintiffs concede in their brief that in fact "the post-March 1972 discrimination . . . had no 'effects.'" Because the racial imbalance of which the plaintiffs complain was neither aggravated nor perpetuated by the defendants' actionable discrimination, the liability of defendants for that limited threat of discrimination does not create a proper platform from which to reach back to correct the racial imbalance.¹⁴

Even under the majority's view of this case, a remand is essential. Had the district judge initially found the defendants liable for as little as this court does today, I cannot believe he would have imposed the drastic remedy which the majority now sustains. It is conceded that the only objectionable "use" of a written examination by the defendants was their intent to narrow the field of applicants to the top 544 scorers

section 1981. But that statute, as I explain above, appears to require proof of a discriminatory intent, and the district judge explicitly found as a matter of fact that such intent was lacking here.

14. "At the threshold we observe that Title VII speaks only to the future. The only justification for a backward gaze is in determining whether a present employment practice may, in fact, perpetuate past discrimination." *EEOC v. University of N. M.*, 504 F.2d 1296, 1301 (10th Cir. 1974).

on the 1972 exam. This plan was made only after an apparently nondiscriminatory system (interviewing randomly selected applicants who passed the 1972 exam) was enjoined in a state court proceeding. It came when the defendants were under the great stress of needing to fill mounting vacancies and at a time when they were affirmatively working to end prior discriminatory practices.

In light of these facts, I would reverse and remand to the district court for reconsideration of the appropriateness of quotas in this case.¹⁵ It is clear to me that the court can fashion an effective order prohibiting any discriminatory use of the 1972 examination directly without imposing quotas.

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

VAN DAVIS, et al., vs. COUNTY OF LOS ANGELES, et al., etc., <i>Plaintiffs-Appellants,</i> <i>Defendants-Appellees.</i>	No. 73-3008
VAN DAVIS, et al., vs. COUNTY OF LOS ANGELES, et al., etc., <i>Plaintiffs-Appellees,</i> <i>Defendants-Appellants.</i>	No. 73-3009

OPINION

[October 20, 1976]

Appeal from the United States District Court
for the Central District of California

Before: TUTTLE,* HUFSTEDLER and WALLACE,
Circuit Judges.

TUTTLE, Circuit Judge:

This suit was brought on behalf of all past, present and future black and Mexican-American applicants for positions as firemen with the Los Angeles County Fire Department, alleging that the defendants Los Angeles County, the Board of Supervisors of the County and the County Civil Service Commission had been guilty of past discrimination in hiring in violation of the Fourteenth Amendment, the Civil Rights Act of 1866, 42 U.S.C.

*Honorable Elbert P. Tuttle, Senior United States Circuit Judge, Fifth Circuit, sitting by designation.

§§1981, 1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*¹

The district court found that the L.A. County Fire Department employed blacks and Mexican-Americans grossly out of proportion to their number in the population of L.A. County. The court further found that the Fire Department, despite its admitted knowledge of its prior discriminatory practices and its bad reputation as an employer in the minority community, failed to undertake any effective positive steps to eradicate the effects of prior discrimination. Accordingly the court ordered accelerated hiring of racial minorities in a ratio of one black and one Mexican-American applicant hired for each five white applicants hired until the effects of past discrimination had been erased.²

Despite the fact that the Mexican-American population of L.A. County was approximately double the size of the black population, the district court ordered identical accelerated hiring due to its finding that the Fire Department's 5 foot, 7 inch height requirement for job applicants was a valid requirement for employment, and that this height requirement had the effect of eliminating 45% of the otherwise eligible Mexican-American applicants from consideration.

The plaintiffs appeal the trial court's finding that the 5'7" height requirement is valid and could therefore be used in limiting the relief available to the Mexican-American members of the plaintiff class. The defendants cross-appeal the trial court's order of accelerated hiring. We affirm the district court's order of accelerated hiring to cure past racial discrimination; we disagree with the court's determination that the 5'7" height requirement has been sufficiently validated by the defendants, and accordingly we reverse and remand for reconsideration of the proper ratio of accelerated racial hiring to be ordered.

¹Jurisdiction was based on 28 U.S.C. §1343. The additional allegations of racial discrimination in promotions were abandoned prior to trial.

²Data introduced by the plaintiffs showed that this 1-1-5 ratio, given the present rate of new hiring, would produce a work force of minority firemen in proportion to the number of minority persons in the work-force by 1979 for blacks and 1983 for Mexican-Americans.

I. PROCEDURAL DEFENSE

Despite a minority population of approximately 29.1% in L.A. County, only 3.3% of the firemen employed by the defendants were black or Mexican-American at the time of trial. The defendants do not, and indeed cannot, dispute the trial court's finding that these data establish a prima facie case of racial discrimination. This Court has recognized that such statistics can prove past racial discrimination. *United States v. Ironworkers Local 86*, 443 F.2d 544, 550 (9th Cir. 1971) *cert. denied* 404 U.S. 984 (1971).³ Unable to contest the indisputable legal effect of these data, the defendants pose a number of procedural defenses all involving the claim that whatever discriminatory practices they might have been guilty of in the past have been ended. Specifically the defendants argue: (1) that the plaintiffs lacked standing to assert the interests of the class aggrieved by past discriminatory practices; (2) that the discriminatory practices complained of occurred prior to March 1, 1972, the date on which Title VII became applicable to cities and municipalities; and (3) that the discriminatory practices complained of occurred prior to the three year statute of limitations on the plaintiffs §§1981 and 1983 claims.⁴

These three arguments are all based on the same undisputed fact: the last time the defendants administered a test to job

³The cases holding that statistics alone may prove a prima facie case of racial discrimination in employment, thereby shifting the burden to the defendants to justify the racial imbalance, are by this time legion. *See, e.g.*, *United States v. Hayes International Corp.*, 456 F.2d 112 (5th Cir. 1972); *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *United States v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *United States v. Masonry Contractors Ass'n.*, 497 F.2d 871 (6th Cir. 1974).

⁴The plaintiffs do not dispute the fact that Title VII became applicable to municipalities on March 1, 1972. *See* 42 U.S.C. §2000e(a). Nor do they dispute the fact that their §§1981 and 1983 claims are governed by the state three year statute of limitations. *See Mills v. Small*, 446 F.2d 249 (9th Cir. 1971) *cert. denied* 30 L.Ed.2d 543 (1971). Because plaintiffs' complaint was filed on January 11, 1973, the occurrences complained of must have happened subsequent to January 11, 1970.

applicants which had discriminatory effect was August 1969.⁵ Thus because none of the class representatives in this suit were unsuccessful applicants in 1969, and because the test was administered prior to the three-year cut off for the §§1981 and 1983 claims, and well before March 24, 1972, accordingly the defendants argue their past discriminatory actions cannot give rise to current liability. The district court found that the past discriminatory acts had continuing effect,^{5a} thereby justifying present relief. We agree. In our view the defendants claim that because the 1969 examination was *administered* in 1969 it accordingly had *effect* only in 1969 is manifestly incorrect.

The 1969 examination was administered to a large group of applicants; the successful applicants who scored well on this examination and in the subsequent interview were certified as eligible candidates, and were placed on an eligibility list for later employment as vacancies occurred in the ranks of the fire-

⁵The defendants do not dispute the fact that this verbal aptitude test had discriminatory impact, and could not be validated under the requirements of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Of the 244 blacks who took this test, 5 were hired; of the 100 Mexican-Americans, 7 were hired, while of the 1080 whites taking the test, 175 were hired. Thus while approximately 25% of the applicants were black or Mexican-American, based on the results of this test only 6.4% of the hires were minorities.

^{5a}The trial court's Finding No. 6 contains the following language: "The accelerated hiring to be ordered by the court is based on all findings, including the following considerations: . . .

(b) It is in the public interest to accelerate the elimination of the racial imbalance at the Los Angeles County Fire Department caused by the past discrimination of defendants.

(c) It appears that unless the court orders accelerated hiring at the Los Angeles County Fire Department there will not be sufficient hiring of blacks and Mexican-Americans as is necessary to overcome the presently existing effects of past discrimination within a reasonable period of time."

Conclusion of Law No. 7 says:

"In order to eliminate the effects of past discrimination against blacks and Mexican-Americans, those effects being the currently existing racial imbalance in the workforce of the Los Angeles County Fire Department, it is appropriate and constitutional to order the Defendants to engage in the hiring of blacks and Mexican-Americans on an accelerated basis as set forth in the Judgment herein. . . ." (Emphasis supplied).

men. The parties stipulated approximately 100 such vacancies occur each year. 187 applicants were placed on the eligibility list following the 1969 examination. Based on these facts, the district court found that the examination had effect past 1969, and we think this was certainly correct. While the plaintiffs failed to show that any candidate on this list was hired after March 24, 1972, it is obvious that most were hired after January 11, 1970. Thus despite the failure of the plaintiffs to prove that specific discriminatory acts occurred during the effective period covered by Title VII, it is clear that discriminatory hiring did take place within the three years prior to their §§1981 and 1983 claims.⁶

The defendants further argue that the district court lacked jurisdiction under either §§1981 or 1983. As to §1983 the defendants are clearly correct. A municipality is not a "person" suable under §1983⁷ and thus the three municipal defendants are not subject to suit under §1983. *Monroe v. Pape*, 365 U.S. 167 (1961); *City of Kenosha v. Bruno*, 412 U.S. 507 (1973). No individual defendants were named in the suit, and thus the plaintiffs §1983 claim is barred.⁸ §1981 is not subject to the same jurisdictional limitations; the language of the statute does not require that a defendant be a "person" before suit may be

⁶We do not consider the plaintiffs' additional arguments that such factors as the defendants' bad reputation in the minority community or nepotistic word-of-mouth recruiting and counselling may, alone, constitute sufficient discriminatory practices as to establish a valid Title VII claim. The evidence on these points was extremely impressionistic and the district court did not rely on these theories.

⁷42 U.S.C. §1983 provides:

"Every person who, under color of any statute . . . of any state . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceedings for redress." (emphasis added)

⁸Individuals may be sued in their official capacity. See *Harper v. Kloster*, 486 F.2d 1134, 1138 (4th Cir. 1973); *United Farmworkers of Florida Housing Project, Inc. v. City of Del Ray Beach, Florida*, 493 F.2d 799, 802 (5th Cir. 1974); *Sterzing v. Fort Bend Independent School District*, 496 F.2d 92, 93 n.2 (5th Cir. 1972). As the plaintiffs did not allege federal question jurisdiction under 28 U.S.C. §1331, their Fourteenth Amendment claim does not stand apart from their §1983 claim.

brought.⁹ Indeed, §1981 speaks only of the rights of the person denied the opportunity to make a contract due to his color—it doesn't attempt to specify who may be sued under its provisions. The construction the Supreme Court placed on the term "person" in *Monroe v. Pape* and *City of Kenosha v. Bruno* as it is used in §1983 was based entirely on the legislative history of that section, which was passed by the Congress entirely separately from §1981. In our view the statutory construction of §1983's use of a specific word does not constitute a blanket prohibition against civil rights suits against municipalities based on other code sections which don't even contain the same limiting language.¹⁰

In our view there is no operational distinction in this case between liability based on Title VII and §1981. §1981 has been construed to bar discrimination in employment by every Circuit which has considered the question. *Waters v. Wisconsin Steel Works of International Harvesters Co.*, 427 F.2d 476 (7th Cir. 1970), *cert. denied* 400 U.S. 911 (1970); *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied* 401 U.S. 948 (1971); *Young v. International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971); *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973); *Long v.*

⁹42 U.S.C. §1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every state . . . to make and enforce contracts . . . enjoyed by white citizens. . . ."

¹⁰*Arunga v. Weldon*, 469 F.2d 675 (9th Cir. 1972) might be read as applying the jurisdictional limits of §1983 to all civil rights sections. This two paragraph per curiam does not explain the reasons for such a holding, if that was in fact the basis for the holding, and we are reluctant to infer such a broad and sweeping holding from it. After circulating this opinion among all the members of this Court, this panel has been authorized to announce that to the extent this opinion is inconsistent with *Arunga*, this latter opinion is the preferred view of the majority of the members of this Court, as stated in *Sethy v. Alameda Co. Water District*, ____ F.2d ____ (9th Cir., *en banc*, 1976) [No. 73-1852 et seq. slip op'n Sept. 30, 1976.]

Ford Motor Co., 496 F.2d 500 (6th Cir. 1974).¹¹ This line of authority is so well-established the defendants do not even attempt to dispute the applicability of §1981 to employment discrimination. We join the seven other Circuits which have considered the question and hold §1981 is available as a remedy against employment discrimination based on color.

Accordingly, we believe the district court properly found the defendants guilty of employment discrimination. Despite the fact they conceded that the discriminatory effects of the verbal aptitude test they used were known even prior to the giving of the examination in 1969, the results of this examination had continued discriminatory effect as the 187 applicants hired after 1970 were employed on the basis of their success with the test. The defendants thus practiced discrimination in hiring which extended into the three year span subject to liability based on the plaintiffs' §1981 claim. As the named plaintiffs were applicants for positions during this period, the fact that they had not previously applied in 1969 is irrelevant, and accordingly they were proper class representatives.

II. THE 5 FOOT, 7 INCH HEIGHT REQUIREMENT

Among the practices of the defendants which the plaintiffs challenged was the 5'7" height requirement. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) the Supreme Court unanimously held that Title VII forbids the use of employment tests which have discriminatory effect unless the employer meets "the burden of showing that any given requirement [has] . . . a manifest relation to the employment in question." 401 U.S. at 432. This burden arises only after the challenger proves that the tests in question have the effect of selecting applicants for employment or promotion in a racial pattern significantly different from that

¹¹See generally Comment, Racial Discrimination and Employment Under the Civil Rights Act of 1966, 36 *U.Chi.L.Rev.* 615 (1969); Herbert and Roischel, Title VII and the Multiple Approaches to Eliminating Employment Discrimination, 46 *N.Y.U.L. Rev.* 449 (1971); Peck, Remedies for Racial Discrimination in Employment, 46 *Wash.L. Rev.* 455 (1971); Larson, The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment, 7 *Harv. Rights—Civ. Lib. L. Rev.* 56 (1972).

of the pool of applicants. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Discriminatory tests are impermissible unless shown "by professionally acceptable methods," *Albemarle Paper Co. v. Moody*, 43 LW 4880, 4888 (1975) to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." 20 C.F.R. §1607.4(c), EEOC Guidelines.¹²

Here there can be no question that the 5'7" height requirement has discriminatory impact. The parties stipulated that 45% of the otherwise eligible Mexican-American applicants are excluded by the requirement.¹³ The defendants further conceded that no scientifically approved test has been utilized to determine whether the height requirement is in fact job related. The only testimony in the record on point is that of Chief Stanley E. Barlow, himself only 5'8", who testified that he believed a smaller man might have difficulty working with taller men in removing long ladders and other equipment, and might have a slower reaction time in climbing on and off equipment. Chief Barlow conceded that in the past firemen under 5'7" have been able to function without impairment due to their height.¹⁴

It seems clear to us that this testimony falls far short of validating a height requirement which had a serious impact in restricting Mexican-American employment in the County Fire

¹²These EEOC Guidelines were recently approved by the Supreme Court in *Albemarle Paper Co. v. Moody*, 43 LW 4880 (1975) as providing standards by which employment requirements may be validated.

¹³We accordingly note that the continuing use of this height requirement would constitute a continuing violation of Title VII and would provide a basis for relief under that section even were §1981 not available. We do not suggest that the validation requirements of Title VII and §1981 are different, however. We believe Title VII validation standards may also be applied in §1981 cases.

¹⁴These shorter firemen were employed during World War II when the standard was relaxed, and when firemen of other cities automatically joined the L.A. County Fire Department when their employing cities were annexed by L.A. County.

Department. The district court erred in finding that the County had proven that the height requirement was job related.¹⁵

III. AFFIRMATIVE RELIEF

The defendants contest the affirmative relief ordered by the district court. As this Court has noted,

"There can be little doubt that where a violation of Title VII is found, the court is vested with broad remedial power to remove the vestiges of past discrimination and eliminate present and assure the non-existence of future barriers to the full enjoyment of equal job opportunities by qualified black employees."

United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9th Cir. 1971) *cert. denied* 404 U.S. 984 (1971). We do not believe the court lacks equal power under §1981 to order relief.

"In fashioning an appropriate remedy for employment discrimination, Congress has granted courts plenary equitable power under both Title VII . . . and section 1981."

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 243 (5th Cir. 1974). Although the decided cases have primarily involved either Title VII or §1983, and not §1981, we do feel the vast case law under both sections approving affirmative relief is directly applicable here. No other case we have found has involved the same odd factual pattern where only §1981 is available to remedy employment discrimination, and we see no reason to limit the relief available under §1981 merely because in the past §1981 and Title VII have been read in tandem. *See, e.g., Boston Chapter, NAACP v. Beecher*, 504 F.2d 1017 (1st Cir. 1975), *cert. denied* _____ U.S. _____ (1975); *Pettway v. American Cast Iron Pipe Co.*, *supra*; *Franks v. Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974); *Johnson v. Goodyear Tire and Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974). Similarly we

¹⁵Similar height requirements have been recently struck down in other cases. *See, Fox v. Washington*, 43 LW 2468 (D.D.C. 4/22/75); *Hardy v. Stumpf*, 37 Cal. App. 3d 958 (1974). *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972) upheld a height requirement for firemen, but only because the plaintiffs had failed to prove discriminatory impact upon Puerto Rican applicants.

note that Title VII and §1983 cases have frequently been cited as involving analogous principles in fashioning equitable relief. See *Carter v. Gallagher*, 452 F.2d 315, 329 (8th Cir. 1971) (*en banc* reversing in part panel opinion, 452 F.2d 315) *cert. denied* 406 U.S. 950 (1972); *Rios v. Enterprise Assn. Steamfitters Local 638*, 501 F.2d 622, 628 (2d Cir. 1974), and cases involving one statute have been cited in support of the relief ordered in cases involving the other.

Eight circuits, including this one, have considered and approved the use of accelerated hiring goals or quotas to eradicate the effects of past discrimination under either Title VII or §1983. *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971) *cert. denied* 404 U.S. 984 (1971) (Title VII); *Boston Chapter, NAACP v. Beecher*, 504 F.2d 1017 (1st Cir. 1974) (§§1981, 1983 and Title VII); *Rios v. Enterprise Assn. Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974) (Title VII); *United States v. Masonry Contractors Assn.*, 497 F.2d 871 (6th Cir. 1974) (Title VII); *Franks v. Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974) (Title VII); *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir. 1974) (*en banc*) (§1983; *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973) *affirming* 361 F.Supp. 1293 (D. Mass. 1973) *cert. denied* 416 U.S. 957 (1974) (Title VII); *Vulcan Society v. Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973) (§1983); *Bridgeport Guardians, Inc. v. Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973); *United States v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973) (Title VII); *Contractors Assn. of Eastern Pennsylvania v. Sec. of Labor*, 442 F.2d 159 (3d Cir. 1971) *cert. denied* 404 U.S. 854 (1971) (Title VII); *Pennsylvania v. O'Neill*, 473 F.2d 1029 (3d Cir. 1973) (*en banc*) (§1983); *United States v. Local 212, IBEW*, 472 F.2d 634 (6th Cir. 1973) (Title VII); *United States v. Wood, Wire and Metal Lathers International Union Local 46*, 471 F.2d 408 (2d Cir. 1973) *cert. denied* 412 U.S. 939 (1973) (Title VII); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972) (§1983); *United States v. Carpenters Local 169*, 457 F.2d 210 (7th Cir. 1972) *cert. denied* 409 U.S. 851 (1972) (Title VII); *Carter v. Gallagher*, 452 F.2d 337 (8th Cir. 1971) (*en banc*) *cert. denied* 406 U.S. 950 (1972) (§1983); *United States v. IBEW Local 38*, 428 F.2d 144 (6th Cir. 1970) *cert. denied* 400 U.S. 943 (1970)

(Title VII); *Local 53, Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969) (Title VII).¹⁶ While the defendants argue §703j of Title VII forbids the imposition of racial quota hiring, even were this to be an order premised on Title VII, we note this view has been uniformly rejected by the many courts which have considered the question.

We believe the district court properly exercised its discretion in ordering affirmative action to be undertaken to erase the effects of past discrimination. We do not believe that such relief may be limited to the identifiable persons denied employment in the past—for “the presence of identified persons who have been discriminated against is not a necessary prerequisite to ordering affirmative relief in order to eliminate the present effects of past discrimination.” *Carter v. Gallagher, supra*, 452 F.2d at 330.

“Nor are remedial goals limited to any specific or prescribed form. The precise method of remedying past misconduct is left largely to the broad discretion of the district court. Goals have been expressed in terms of specific numbers or ratios . . . or percentages.”

Rios v. Enterprise Assn. Steamfitters Local 638, supra, 501 F.2d at 631. While we remand because the district court expressly stated that the reason it ordered identical accelerated hiring of blacks and Mexican-Americans in equal ratios was because of the validity of the 5'7" height requirement, we do not necessarily believe a 1-1-1 ratio was incorrect (indeed, it was the relief originally requested by the plaintiffs), but the court should reconsider its order in light of our decision that the 5'7" height requirement is invalid.

The defendants finally argue that the imposition of an affirmative order to hire minority applicants is unnecessary. They argue in effect that they have already commenced and that they can be relied upon further to improve their hiring practices without the added impetus of a court order. Certainly the experience in the Fifth Circuit is useful in one regard—“protestations or

¹⁶*Harper v. Kloster*, 486 F.2d 1134 (4th Cir. 1973) did not hold to the contrary, but upheld the district court's refusal to order the imposition of quotas within the facts of that case as not being an abuse of discretion.

repentance and reform timed to anticipate or blunt the force of a lawsuit offer insufficient assurance that the practices sought to be enjoined will not be repeated." *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972). Here the record shows that the defendant had decided to use a similar verbal aptitude test to hire new candidates in 1973, but that this decision was revoked only upon being notified that this suit was to be filed. The Personnel Director of the defendants testified at length at the trial—and he acknowledged that as early as 1969 he was aware of the discriminatory impact of the aptitude test, and that he had recommended changes in recruitment, but that nothing was done on these recommendations. He further testified that the *only* reason the aptitude test wasn't used in 1973 was due to this suit. This record hardly supports the view that left to their own devices the defendants will devise an affirmative action program as effective as that of the district court's. We emphasized that this was not a close case, in the sense that the disproportion between minority candidates hired and the proportion of minority persons in the L.A. community was not grossly out of proportion. In a community of 28.5% minority population, only 3.5% of the candidates hired were blacks or Mexican-Americans. These data are hardly persuasive evidence of the defendants' good faith—even were such good faith relevant in fashioning relief.¹⁷

In sum, we believe the district court was wholly justified in deciding to impose affirmative hiring orders upon the defendants.

While it should be obvious to all, we nevertheless repeat the admonition that nothing said by this court is to be taken as a requirement that the defendants hire any unqualified applicant for the performance of these essential jobs.

AFFIRMED in part and **REVERSED** in part and **REMANDED** for reconsideration not inconsistent with this opinion.

¹⁷In *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971), a Title VII case, the Supreme Court rejected good faith as a defense—"Congress directed the thrust of the Act to the consequences of the employment practices, not simply the motivation." We believe good faith is equally inapplicable to §1981.

WALLACE, Circuit Judge, Dissenting:

I respectfully dissent.

Discrimination in employment based upon race, creed or color is a practice inconsistent with the views and aspirations of nearly all Americans and clearly repugnant to the principles upon which our society is built. But even in rooting out such an evil practice, we are bound by certain procedural and jurisdictional limitations which may serve to protect the rights of others.

I think it is clear from the record that the plaintiffs' challenges to two of the three alleged illegal employment practices are barred by such a jurisdictional limitation: the named plaintiffs have no standing to attack the defendants' pre-1971 hiring procedures or the height limitation. While the plaintiffs may nevertheless have standing to challenge the post-1971 procedures, I question whether the imposition of minority hiring quotas is warranted given the limited scope of this issue. Because this is a question which should be resolved in the first instance by the trial judge, however, I would reverse and remand for reconsideration of the appropriate remedy in light of the limited standing of the plaintiffs in this case.

I. Standing to Challenge the Pre-1971 Written Tests

The district court held and the majority affirms that the plaintiffs made out a prima facie case of employment discrimination by proving that at the time the complaint was filed in 1973, only 3.3 percent of the firemen employed by the defendants were black or Mexican-American despite the fact that those minorities accounted for approximately 29.1 percent¹ of the population of Los Angeles County. These employment statistics are necessarily the result of the defendants' pre-1971 hiring practices since no firemen were hired thereafter until the complaint was filed. As the undisputed evidence showed, however, these procedures were abandoned in 1971 in an effort to correct the fire department's racial imbalance. None of the named plaintiffs made application before October 1971. Given these facts, the standing question is simple. Even in cases of racial discrimination, a showing of injury in fact or threat of injury

¹The district court found that 10.8 percent of the population of Los Angeles County was black and 18.3 percent Mexican-American.

in fact from the allegedly illegal conduct is necessary in order to find standing. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-68 (1972). Neither named plaintiffs nor members of the plaintiff class have suffered or were threatened with any injury in fact from the pre-October 1971 hiring procedures and they therefore have no standing to litigate the legality of those procedures.

The majority attempts to surmount this standing problem by arguing that the effects of the pre-1971 procedures continued until after the plaintiffs applied for employment in October 1971. I cannot accept this argument.

The villain of the pre-1971 procedures was a discriminatory written test used as a ranking device. All hiring was done from an eligibility list which was the final product of an examination process. The process began with the written test and a physical agility test and the top scorers were then selected for oral interviews. A total score was given each applicant, with the discriminatory written test having a 35 percent weighted value. The highest ranking candidates were certified for placement on the eligibility list from which vacancies were filled. When the list was exhausted, which usually happened in about two years, a new examination process would begin in order to produce a new eligibility list.

The last of these examination processes was initiated in 1969 by the administration of the discriminatory written test. The majority at page 4, *ante*, states that the district court found that the "1969 examination had continuing effect." The district court's Findings of Fact and Conclusions of Law do not support the majority's statement. The district court's language, fairly read, establishes what no member of the panel disputes: discrimination in 1969 and years prior thereto resulted in a "currently existing racial imbalance in the workforce of the Los Angeles County Fire Department."² That language does *not* establish that the discriminatory 1969 examination, or any prior discriminatory practice, adversely affected or "injured in fact" any of the named plaintiffs in their efforts to secure employment. Further, it is apparent from the first page of the Findings of Fact and

²See footnote 5a of the majority opinion.

Conclusions of Law that they were prepared by the attorneys representing the class plaintiffs. Thus, even if there were a finding as suggested by the majority, a careful examination of the record must be made to determine whether it would be supported. See *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964); *Nissho-Iwai Co. v. Star Bulk Shipping Co.*, 503 F.2d 596 (9th Cir. 1974).

The supposed continuing effect of the 1969 examination apparently stems from the belief that the pool of applicants produced by this examination somehow affected the named plaintiffs' chances of being hired. However, the evidence does not support such a finding, even if made. I find nothing in the record indicating how many firemen were hired in the years 1970-72. There is a stipulation that there normally are 100 firemen hired per year. There is also testimony that the 1969 examination produced a 187-applicant eligibility list. But there were no findings made on hirings.

These facts may support a finding (if made) that some firemen were hired from the 1969 test list after January 11, 1970, and obviate the statute of limitations problem. But projections from these facts do not support a finding (which was never made) that any applicants from the 1969 examination list were hired after October 1971 when the named plaintiffs applied or, more importantly, after the January 1972 test when they became eligible for oral interviews and eventual certification for appointment. Indeed, assuming 100 hirings per year, the 187-applicant 1969 list would have been exhausted some time in early 1971.

The only other evidence in the record, though meager, supports this view of the facts. First, Mr. Nesvig, the Los Angeles County Personnel Director, was asked why in December 1972 they decided to interview only the top 544 scorers on the 1972 test even though they knew that would have a disproportionate detrimental effect on minorities. His response was: "We were desperate, in my opinion. . . . We had gone for almost two years [i.e., since early 1971] with many vacancies" Later, Mr. Barlow, Chief Deputy Engineer and the number two man in the Los Angeles County Fire Department, was asked why they had not had any affirmative action since 1971. His response: "We did not have a list to hire off of, and our first class off of this [the

current] list, which examination [meaning the entire process from initial application to eligibility list] started in 1971, . . . was not started until April 9 [1973]."

Thus I think it clear that the pre-1971 procedures had no impact on the named plaintiffs in this case. They therefore have no standing to challenge those procedures and the district court did not have jurisdiction to consider the results of those examinations.

II. The Challenge to the Post-1971 Procedures

As noted above, prior to accepting applications for a new examination procedure in 1971, the entire procedure was changed. Since the named plaintiffs' applications were processed under these new procedures, they clearly have standing to litigate the legality of these procedures. Given the limited scope of the claim, however, I question the appropriateness of the sweeping injunctive relief granted.

The new procedures were to be as follows. Written tests were to be eliminated as a ranking device, but because of the large number of applicants (3500) and the relatively few job openings (33), some method had to be adopted to limit the number of applicants interviewed. Thus a new written test was designed in an attempt to eliminate cultural bias. The test was to be given and graded on a pass-fail basis for the sole purpose of screening out illiterates. Five hundred of the passing applicants were to be selected at random for oral interviews. This method eliminated the written test as a ranking device and gave every passing applicant an equal opportunity to be chosen for an oral interview. Ninety-seven percent of the applicants passed the written test; 1,885 were white, 170 black and 283 Mexican-American. The passing applicants were to be ranked solely on the basis of the results of the physical agility test and the oral interviews.

After administration of the written test, but before the random selection could be made, a lawsuit was filed in state court against the county, charging that the random selection process violated provisions of the county charter and civil service regulations requiring that selection for oral interviews be made on merit. The county was enjoined from using this method pending trial

on the merits. As a result, the examination process was halted for over two years and no interviews or physical tests were given and no eligibility list was certified.

As vacancies increased, the county fire department urged that the applicants, who by this time had been waiting for almost 18 months, be interviewed and an eligibility list certified. In desperation, the county Department of Personnel proposed to interview those applicants who had received the top 544 scores on the 1972 written test. Of this number, 492 were white, 10 black and 33 Mexican-American. The applicants were not to be ranked on the basis of the test results, however, and the interviews were not intended to eliminate the remaining applicants from consideration. The purpose was solely to expedite the hiring of sufficient firemen to meet the immediate, urgent requirements of the fire department.

The plaintiffs herein objected to this proposal. Upon learning of the complaint about to be filed in this action, the Director of Personnel abandoned the plan and implemented a new procedure whereby all of the passing applicants would be interviewed. The interviews commenced on January 20, 1973.

The plaintiffs filed this civil rights action naming as defendants the County of Los Angeles, the Board of Supervisors of the county and the Civil Service Commission. The complaint alleged racial discrimination in violation of 42 U.S.C. §§ 1981 and 1983. The defendants completed interviewing all of the applicants by the end of March 1973 and certified an eligibility list. Of the top 315 applicants on this list, 210 were white, 39 black, 59 Mexican-American and 7 of other races (a total of 33.5 percent minorities). It was conceded by the plaintiffs that this examination and ranking procedure did not have a discriminatory impact on blacks and Mexican-Americans.

At the conclusion of the trial, the district court specifically found that the defendants had not interfered with affirmative action efforts designed to increase black and Mexican-American participation rates and that, to the contrary, several officials had engaged in efforts designed to increase minority representation in the fire department. The court further found that neither the defendants nor their officials had engaged in employment

practices with a willful or conscious purpose of excluding blacks and Mexican-Americans from employment.

The court concluded, however, that the defendants had failed to take the necessary affirmative action to overcome the existence in the minority community of a discriminatory reputation and had engaged in the discriminatory employment practice of utilizing as a selection device non-validated written tests that had a disproportionate detrimental impact on blacks and Mexican-Americans. I agree with the majority that the subjective discriminatory reputation of the fire department cannot be the basis of a valid section 1981 claim.

The challenge to the use of the 1972 written test as a selection device is appropriate under section 1981. The claim is not mooted by the decision, prompted by the filing of this lawsuit, not to use the written test as a selection device but instead to interview all the applicants. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). There is nothing per se wrong with written employment tests; violation of section 1981 occurs only when the test is found to have a disproportionate detrimental impact on a minority group and has not been sufficiently validated as reasonably related to job performance. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Here, the district court found that the 1972 test violated the *Griggs* standard and I cannot conclude that the finding was clearly erroneous.

Even if the plaintiffs have established a section 1981 violation with respect to the defendants' use of the 1972 written test results, however, that violation does not necessarily justify the imposition of minority hiring quotas on the defendants. The use of quotas must be carefully weighed. As the Supreme Court stated in *Griggs*:

Congress did not intend by Title VII [and inferentially by section 1981], however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers

to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Id. at 430-31.

In this case the trial judge ordered that 20 percent of all newly-hired firemen be black and that 20 percent be Mexican-American, compared to the respective proportions of those minorities in the population of 10.8 percent and 18.3 percent. Imposition of this hiring quota may well result in discrimination against equally or better qualified applicants solely on account of their race. Here, for example, a native American Indian, Asian-American, Hungarian-American or Polish-American may not be hired in order to provide a job for a black or Mexican-American. While quotas are sometimes necessary to correct past discrimination against certain groups, the possible prejudicial effects on others must be weighed closely by the district court.³

Thus, in a recent case very similar to this one, the Second Circuit reversed the district court's imposition of quotas as unwarranted. *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420 (2d Cir. 1975). The case involved a challenge to the use of a discriminatory written test as a basis for promotion under a civil service system. The plaintiffs challenged the disproportionate impact only of the most recent test and made no claim of bad faith or intentional discrimination. The district court ordered the defendants to develop a validated non-discriminatory promotion procedure and imposed

³See *McDonald v. Santa Fe Trail Transp. Co.*, ____ U.S. ____ (June 25, 1976) (section 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., prohibit racial discrimination in private employment against white persons upon the same standards as racial discrimination against nonwhites). Cf. *Franks v. Bowman Transp. Co.*, ____ U.S. ____ (March 24, 1976) (Burger, C.J., concurring and dissenting) (white employees injured by award of retroactive seniority to nonwhites may petition for equitable relief on their own behalf).

I agree, of course, that equitable relief to rectify past discrimination will often impose burdens on those innocent of any discriminatory activity. *Franks v. Bowman Transp. Co.*, *supra*, ____ U.S. at ____ (slip op. at 24-30). But the equitable relief should be tailored only to ameliorating the effects of past unlawful discrimination. See *id.*; note 4 *infra*.

promotion quotas to cure the effects of past discrimination. The Second Circuit upheld the order to develop a non-discriminatory procedure, but with respect to the imposition of quotas, held that "[i]n view of the limited scope of the issues framed in this class action . . . the imposition of permanent quotas to eradicate the effects of past discriminatory practices is unwarranted." *Id.* at 428 (footnote omitted).⁴

Here, the district judge obviously imposed the quotas to overcome the effects of the pre-1971 procedures because at the time the suit was commenced, there had been no hiring based upon the 1972 written test. Since the plaintiffs had no standing to challenge these pre-1971 procedures, I would reverse and remand the case to the district court for reconsideration of the appropriateness of quotas in this case. It is clear to me that the court can fashion an order prohibiting any discriminatory use of the 1972 test results directly without imposing quotas.

III. The Height Limitation

The only issue remaining is that pertaining to the height limitation. It comes to us by a curious route. The plaintiffs phrase their request for relief as follows:

The only modification of the Judgment sought on this appeal is an increase in the Mexican-American hiring ratio, such increase to be ordered if there is a reversal by this Court of Appeal of the District Court's conclusion of law that the height standard is job-related and legal. Plaintiffs-appellants did not seek below and do not seek on this appeal, an order enjoining the use of the 5'7" height standard.

⁴The court also noted that the quotas would unnecessarily nullify the state constitutional provisions requiring that promotions be made from the top three officers on the eligibility list, a decision which should be left to "the people speaking through their legislators." *Id.* at 429.

See also *Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976) (racial quotas in public employment layoffs not designed to remedy past discrimination are not authorized under section 1981 or Title VII); accord, *Weber v. Kaiser Alum. & Chem. Corp.*, ___ F. Supp. ___ (E.D. La. 1976), 45 U.S.L.W. 2018 (Title VII in private employment context).

If the plaintiffs have never put the legality of the height limitation in issue, I do not see how the district judge abused his discretion in taking the height limitation into account in fashioning the remedy.

But even if the issue is before us, there is once more a complete absence of parties having standing to pursue it. None of the named plaintiffs are alleged to be under 5'7". To the contrary, it has been stipulated that all named plaintiffs are present employees or presently on an eligibility list. Since one of the requirements is a minimum height of 5'7", each of them must be at least that tall. Consequently, none of them have suffered an injury in fact from the alleged discriminatory practice.

Although the class was certified as "all present and future . . . Mexican-American applicants," some of whom may be less than 5'7" tall, the named plaintiffs cannot represent them because their interests are antagonistic. Fed. R. Civ. P. 23 (a)(3), (4). Applicants 5'7" and taller have an interest in limiting the number of their competitors by retaining the height requirement. This may be the reason why the plaintiffs did not ask that the height limitation be enjoined but merely now seek a larger hiring quota for Mexican-Americans in spite of it.

I would therefore reverse and remand.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VAN DAVIS, HERSHEL CLADY and)	
FRED VEGA, individually and on)	
behalf of all others similarly situated;	)	CIVIL
WILLIE C. BURSEY, ELIJAH HARRIS,	)	NO.
JAMES W. SMITH, WILLIAM CLADY,	)	73-63-WPG
STEPHEN HAYNES, JIMMIE ROY)	
TUCKER, LEON AUBRY, RONALD	)	JUDGMENT
CRAWFORD, JAMES HEARD,)	
ALFRED R. BALTAZAR, OSBALDO)	
A. AMPARAN, individually and on)	
behalf of all others similarly situated,)	
)	
Plaintiffs,)	
vs.)	
)	
COUNTY OF LOS ANGELES:)	
BOARD OF SUPERVISORS OF)	
THE COUNTY OF LOS ANGELES,)	
and CIVIL SERVICE COMMISSION)	
OF THE COUNTY OF LOS ANGELES,)	
)	
Defendants.)	
)	

In accordance with the Findings of Fact and
Conclusions of Law filed herein, it is on this
day of July, 1973,
Ordered:

1. Defendants County of Los Angeles, Board of Supervisors of the County of Los Angeles, and the Los Angeles County Civil Service Commission ("Defendants") are permanently enjoined and restrained from engaging in any employment practice which discriminates on the basis of race or national origin against the class represented by Plaintiffs in this Action, that class being all present and future black and Mexican-American firemen applicants and firemen employees at the Los Angeles County Fire Department.

2. Defendants shall in good faith make all affirmative action efforts reasonably possible and necessary to increase the black and Mexican-American participation rates in the fireman workforce at the Los Angeles County Fire Department, until such time as those participation rates are commensurate with the black and Mexican-American population percentages of Los Angeles County.

3. A minimum of twenty per cent (20%) of all new employees employed in fireman positions at the Los Angeles County Fire Department, in any one year, beginning with July 1, 1973, shall be blacks until such time as the percentage of blacks in the fireman workforce of the Los Angeles County Fire Department is equal to the percentage of blacks in the general population of Los Angeles County.

4. A minimum of twenty per cent (20%) of all new employees employed in fireman positions at the Los Angeles County Fire Department, in any one year, beginning with July 1, 1973, shall be Mexican-Americans until such time as the

percentage of Mexican-Americans in the fireman workforce of the Los Angeles County Fire Department is equal to the percentage of Mexican-Americans in the general population of Los Angeles County.

5. Within thirty days of July first of every year, until such time as the black and Mexican-American participation rates at the Los Angeles County Fire Department are equal to the percentage of blacks and Mexican-Americans in the general population of Los Angeles County, Defendant County of Los Angeles shall file a report with the Court and counsel for Plaintiffs, or any person designated by such counsel; the report shall set forth the total number of new employees employed in fireman positions at the Los Angeles County Fire Department during the immediately preceding twelve month period, with a racial breakdown showing the number of blacks and the number of Mexican-Americans among such new employees. Further, such a report shall be made within thirty days of January 1, 1974, but shall not be required thereafter except on each July first, as provided for immediately above.

6. For purposes of this Order the race and/or national origin of each applicant and new employee shall be determined by a questionnaire to be completed by each applicant, giving each applicant an opportunity to designate whether he is "black", "Mexican-American", "Spanish-surnamed" shall be considered "Mexican-Americans." If it is determined by Defendants to be convenient administratively, the described questionnaire may be included as part of Defendants' application form for fireman positions. Counsel for Plaintiffs,

upon reasonable notice in writing, shall have access to all such applications and/or questionnaires.

7. Nothing in this Order shall in any way be deemed to require or encourage Defendants: (a) to employ any person not qualified for a fireman position with the Los Angeles County Fire Department; or (b) to in any way lower or refrain from increasing the standards for employment as firemen at the Los Angeles County Fire Department, provided such standards are reasonably related to the qualifications of potential firemen; all other provisions in this order are subordinate to the provisions of this paragraph numbered seven (7) and shall be subject to modification in the event of any conflict herewith.

8. Plaintiffs shall be awarded reasonable costs and attorneys' fees, to be paid by Defendant Los Angeles County. Counsel for Plaintiffs and counsel for Defendant County of Los Angeles, shall meet within ten days of entry of this Order to attempt to agree on the amount of such costs and attorneys' fees. If the parties reach such agreement, the parties shall submit to the Court, by stipulation, a proposed Order reflecting such agreement. If the parties are unable to reach such an agreement, Plaintiffs shall be entitled to move within twenty days of the date of this Order, on the regular motion calendar, for a determination by the Court of the appropriate amount of such costs and attorneys fees.

9. Paragraphs three (3) and four (4) of this Order are subject to the provision that employees hired pursuant to a merger with or acquisition of

other fire departments by Defendants, as well as employees hired into Defendants' regular training classes for new firemen, shall be considered "new employees"; this provision as to mergers and acquisitions however, does not require Defendants to hire forty percent blacks and Mexican-Americans in the year in which the merger or acquisition occurs, provided that:

- (a) at least forty percent of the new employees hired into the training class or classes, during the year the merger or acquisition occurs, are black or Mexican-American; and in addition
- (b) if the merger or acquisition involves a fire department of less than fifty fireman employees, within two years after the merger or acquisition occurs, Defendant shall have hired sufficient numbers of blacks and Mexican-Americans to meet the forty (40) percent requirements of paragraphs three (3) and four (4) of this Order; or if the merger involves a fire department of fifty to ninety-nine fireman employees, within three years after the merger occurs, Defendants shall have hired sufficient numbers of blacks and Mexican-Americans to meet the forty (40) percent requirements of paragraph three (3) and four (4) of this Order; or if the merger or acquisition involves a fire department

of from two-hundred and one to four hundred and ninety-nine fireman employees, within a proportionate number of years to those given immediately above, Defendants shall have hired sufficient numbers of blacks and Mexican-Americans to meet the forty percent requirements of paragraphs three (3) and four (4) of this Order; and

- (c) provided further that subparagraph 9 (b) immediately above shall be deemed satisfied if Defendants select the alternative procedure of hiring in the next succeeding regular training class or classes after the occurrence of any merger or acquisitions, no less than fifty (50) percent blacks and Mexican-Americans, until such time as the over-all number of black and Mexican-American new employees hired after entry of this order equals forty percent of all new employees as required by paragraphs three (3) and four (4) of this Order; and
- (d) provided further that the provisions of this paragraph number Nine (9) of this order shall not be applicable to any merger involving a fire department with more than 500 fireman employees, and if such a merger occurs any party may apply to this Court for such relief as the law

and the interests of justice may require in the situation.

10. Paragraphs three (3) and four (4) of this Order also are subject to the provision that employees of any race or national origin who fail to complete their probationary periods shall not be counted in determining whether the requirements of paragraphs three (3) and four (4) of this Order are being met, provided that if in any year a disproportionately high number of blacks and Mexican-Americans are terminated prior to completion of their probationary period, Defendants shall be required to employ in the next succeeding training class, sufficient numbers of blacks and Mexican-Americans as is required to bring the percentage of blacks and Mexican-Americans employed in the two training classes, taken together, within the requirements of paragraphs three (3) and four (4) of this Order.

11. The Court shall maintain continuing jurisdiction of this action for such alterations or amendments to this Order or other relief as may appropriate, until such time as the black and Mexican-American participation rates in the fireman workforce of the Los Angeles County Fire Department are equal to the percentage of blacks and Mexican-Americans in the general population of Los Angeles County, at which time any party may apply to the Court for dissolution of this Order, and such dissolution shall be granted provided the black and Mexican-American participation rates at the Los Angeles County Fire Department are commensurate with the percentage of blacks and Mexican-Americans in the general population of

Los Angeles County.

Dated: 1973
Consented to, as to
form only, subject to
Intervenor's statement:

William P. Gray
United States District Judge

A. THOMAS HUNT
CARLYLE W. HALL, JR.
MARY D. NICHOLS
JOHN R. PHILLIPS
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APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VAN DAVIS, et al.,)	
	)	CIVIL ACTION
Plaintiffs,	)	NO. 73-63-WPB
vs.)	
	)	FINDINGS OF
COUNTY OF LOS ANGELES, et al.,	)	FACT AND
	)	CONCLUSIONS
Defendants.	)	OF LAW
)	

The Court, after trial, and based upon the Pre-Trial Order and all other papers filed herein, and all proceedings had herein, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Defendant County of Los Angeles, Defendant Board of Supervisors of the County of Los Angeles, and Defendant Los Angeles County Civil Service Commission ("Defendants") are governmental entities established pursuant to the Constitution and laws of the state of California. Defendant County of Los Angeles performs the function among others, of providing fire prevention and fire protection services in certain districts located within the geographical boundaries of Los Angeles County. Those services are performed through the Los Angeles County Fire Department. Intervening Defendant Los Angeles

County Fire Fighters, Local 1014 ("Intervenor") represents the firemen currently employed at the Los Angeles County Fire Department. Plaintiffs are blacks and Mexican-Americans who are either incumbent firemen at the Los Angeles County Fire Department or are present applicants for employment with that department.

2. The workforce at the time the complaint herein was filed, at the Los Angeles County Fire Department, consisted of 1,762 firemen, of whom nine (0.5%) are black and fifty (2.8%) are Mexican-American. In Los Angeles County, 10.8% of the inhabitants are black and 18.3% are Mexican-American. Defendants did not justify, at the trial or other proceedings herein, the paucity of black and Mexican-American firemen employees at the Los Angeles County Fire Department, as compared to the general population statistics for those minority groups.

3. Defendants have engaged in the following employment practices: (a) utilizing, until learning that this lawsuit was about to commenced, written tests as a selection device for entry level positions at the Los Angeles County Fire Department, although such tests had a disproportionate detrimental impact upon black and Mexican-American applicants, and despite the fact that such tests have not been shown by a validation study to be related to or predictive of job performance statistically; and (b) failing and refusing to take necessary affirmative steps to overcome the existence in the black and Mexican-American communities of Los Angeles County of a reputation that the Los Angeles County Fire Department discriminates against blacks and

Mexican-Americans.

4. Defendants did not interfere with affirmative action efforts of individual persons designed to increase black and Mexican-American participation rates in the workforce of the Los Angeles County Fire Department.

5. Defendants' minimum height standard of 5'7" is substantially and reasonably related to job performance as a fireman.

6. The accelerated hiring to be ordered by the Court is based on all Findings, including the following considerations:

- (a) it seems evident, as officials of Defendants testified at the trial, that Defendants will have no difficulty finding sufficient numbers of qualified Mexican-American potential firemen to fill the required ratios;
- (b) it is in the public interest to accelerate the elimination of the racial imbalance at the Los Angeles County Fire Department caused by the past discrimination of Defendants;
- (c) it appears that unless the Court orders accelerated hiring at the Los Angeles County Fire Department, there will not be sufficient hiring of blacks and Mexican-Americans as is necessary to overcome the presently existing effects of past

discrimination within a reasonable period of time;

- (d) it appears that a Court order requiring accelerated hiring of minorities will aid those officials of Defendants who desire the elimination of the effects of past discrimination, in that such an order in all likelihood will make minority recruiting efforts more effective;
- (e) because the Court concludes infra at conclusion Number Five (5) that Defendants' requirement that all applicants be not less than 5'7" in height is valid, appropriate and legal, and because it was stipulated herein that the 5'7" minimum heights requirement eliminates from consideration approximately 41% of the Mexican-American male population, it will be more difficult for Defendants to recruit sufficient numbers of Mexican-Americans on an accelerated basis is reduced.

7. Neither Defendants nor their officials engaged in employment practices with a willful or conscious purpose of excluding blacks and Mexican-Americans from employment at the Los Angeles County Fire Department. To the contrary, several of Defendants' officials engaged in efforts designed to increase the minority representation in the Los Angeles County Fire Department. Defendants did, however, intentionally engage in the employment

practices outlined above in Finding of Fact Number Three (3).

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action under Title 28, U. S. C. §1343, this being a suit in equity to redress the deprivation of rights guaranteed by the laws of the United States. Those rights are guaranteed by 42 U. S. C. §§1981 and 1983 and Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. 2000e et seq. ("Title VII").

2. This action may be maintained by the Plaintiffs as a class action pursuant to Rule 23 (a) and 23 (b)(1) and (2) of the Federal Rules of Civil Procedure. The class represented is all present and future black and Mexican-American applicants and employees at the Los Angeles County Fire Department.

3. Plaintiffs' cause of action is not barred by any applicable statute of limitations. United States v. Local 1, Ironworkers, 438 F.2d 679, 683 (7th Cir., 1971); United States v. Local 38, IBEW, 428 F.2d 144 (6th Cir., 1970), cert. denied 400 U. S. 943 (1970).

4. In cases involving discrimination based on race and national origin, "statistics often tell much, and Courts listen." Alabama v. United States, 304 F.2d 583, 586 (5th Cir., 1962), aff'd per curiam, 371 U. S. 37 (1962). In employment discrimination cases it consistently has been held that where employment statistics, such as those before the

Court, reveal a severe disproportion between the percentage of minority employees and the percentage of minorities residing within the relevant geographical area in which the employer is located, a prima facie case of discrimination is established. See, e.g. United States v. Local 86, Ironworkers, 315 F. Supp. 1202, 1236 (W. D. Wash., 1970), aff'd 443 F.2d 544, 551 (9th Cir., 1971) cert. denied 404 U. S. 984 (1971); United States v. Hayes International Corp., 456 F.2d 112, 120 (5th Cir., 1972); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 426 (8th Cir., 1970). Defendants in this case did not rebut the prima facie case for Plaintiffs established by the statistics, cited in Findings of Fact Number Two (2).

5. Defendants' practice of disqualifying all applicants for fireman positions who fail to fulfill the personal requirement of being at least 5'7" in height is valid, appropriate and not violative of 42 U. S. C. §§1981 or 1983, or of Title VII. Defendants are not required by law to conduct a scientific or empirical study showing whether there is a relationship between that height requirement and job performance.

6. Since Defendants did intentionally engage in employment practices which had the effect of discriminating against blacks and Mexican-Americans (Finding of Fact Number Seven (7)), Plaintiffs have satisfied the showing of intent required by law. Rowe v. General Motors, 457 F.2d 348, 355 (5th Cir., 1972).

7. In order to eliminate the effects of past discrimination against blacks and Mexican-Americans, those effects being the currently existing racial imbalance in the workforce of the Los Angeles County Fire Department, it is appropriate and constitutional to order the Defendants to engage in the hiring of blacks and Mexican-Americans on an accelerated basis as set forth in the Judgment herein. United States v. Local 86, Ironworkers, 315 F. Supp. 1202, 1248 (W.D. Wash., 1970); aff'd 443 F.2d 544 (9th Cir., 1971), cert. denied 404 U.S. 984 (1971); United States v. IBEW, Local 212, 472 F.2d 643 (6th Cir., 1973); Carter v. Gallagher, 452 F.2d 315 (8th Cir., 1972) cert. denied 406 U.S. 950 (1972).

8. Plaintiffs as prevailing parties are entitled to costs and reasonable attorneys fees against Defendant County of Los Angeles.

Dated: , 1973
Consented to, as to
form only, subject to
intervenor's statement

William P. Gray
United States District Judge

A. THOMAS HUNT
CARLYLE W. HALL, JR.
MARY D. NICHOLS
JOHN R. PHILLIPS
BRENT N. RUSHFORTH
FREDRIC P. SUTHERLAND

STUART P. HERMAN

By /s/ A. Thomas Hunt

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Stephen Reinhardt

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APPENDIX

Supreme Court, U. S.

FILED

SEP 5 1978

MICHAEL RODAR, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1978
No. 77-1553

COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS OF
THE COUNTY OF LOS ANGELES; and CIVIL SERVICE
COMMISSION OF THE COUNTY OF LOS ANGELES,

Petitioners,

vs.

VAN DAVIS, HERSHEL CLADY and FRED VEGA, individu-
ally and on behalf of all others similarly situated,
WILLIE C. BURSEY, ELIJAH HARRIS, JAMES W.
SMITH, WILLIAM CLADY, STEPHEN HAYNES, JIMMIE
ROY TUCKER, LEON AUBRY, RONALD CRAWFORD,
JAMES HEARD, ALFRED R. BALTAZAR, OSBALDO A.
AMPARAH, individually and on behalf of all others
similarly situated,

Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit.

PETITION FOR CERTIORARI FILED APRIL 28, 1978.
CERTIORARI GRANTED JUNE 19, 1978.

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JAMES HEARD, ALFRED R. BALTAZAR, OSBALDO A.
AMPARAH, individually and on behalf of all others
similarly situated,

Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit.

APPENDIX

APPENDIX A.

Second Amended Complaint for Injunction in Connection With Employment Practices of Los Angeles County, Pursuant to Rule 23, FRCP.

United States District Court, Central District of California.

Van Davis, Hershel Clady and Fred Vega, individually and on behalf of all others similarly situated; Willie C. Bursey, Elijah Harris, James W. Smith, William Clady, Stephen Haynes, Jimmie Roy Tucker, Leon Aubry, Ronald Crawford, James Heard, Alfred R. Baltazar, Osbaldo A. Amparan, individually and on behalf of all others similarly situated, Plaintiffs, vs. County of Los Angeles; Board of Supervisors of the County of Los Angeles, and Civil Service Commission of the County of Los Angeles, Defendants.

1. *Jurisdiction.* The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. §1343(3)(4), this being a suit in equity to redress the deprivation under color of law, custom, or usage of rights guaranteed and secured by the Fourteenth Amendment to the United States Constitution, by 42 U.S.C. §§1981 and 1983, and by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, *et seq.*, which prohibit discriminatory employment practices based on race, color, or national origin. Attached to this Second Amended Complaint as Exhibits "A" and "B" are true and correct copies of the "right to sue" letter required by 42 U.S.C. §2000e-5(f)(1) and the charge filed by Plaintiffs with the Equal Employment Opportunity Commission.

2. *Defendant County of Los Angeles.* Defendant County of Los Angeles is a governmental subdivision

of the State of California, established pursuant to the laws and Constitution of the State of California. The Los Angeles County Government performs many functions as an administrative agent of the State of California, including the provision of fire prevention and fire protection services in certain fire districts located within the geographical boundaries of Los Angeles County. These services are performed by Defendant County of Los Angeles through its fire department, known as the Los Angeles County Fire Department. Defendant County of Los Angeles employs approximately seventy thousand persons including approximately nineteen hundred firemen; of these nineteen hundred firemen approximately nine are black and approximately forty-one are Mexican-American.

3. *Defendant Board of Supervisors of the County of Los Angeles.* Defendant Board of Supervisors of the County of Los Angeles (hereinafter "Board of Supervisors") is an elected governmental body created by and operating pursuant to the laws of the State of California and the Charter of the County of Los Angeles. Defendant Board of Supervisors is the Chief governing body of the Los Angeles County Government, and among other duties, is responsible generally for making policy decisions concerning the activities of the Los Angeles County Fire Department.

4. *Defendant Los Angeles County Civil Service Commission.* Defendant Los Angeles County Civil Service Commission (hereinafter "Civil Service Commission") is a governmental body created by and operating pursuant to the laws of the State of California and the Charter of the County of Los Angeles. Its members are appointed by Defendant Board of Supervisors. Defendant Civil Service Commission is a quasi-independent

agency generally responsible for establishing and maintaining the personnel rules and regulations affecting employees of Los Angeles County, including Los Angeles County firemen.

5. *Firemen Plaintiffs.* Plaintiffs Van Davis and Hershel Clady are black citizens of the United States. Plaintiff Fred Vega is a United States citizen who is Mexican-American. Plaintiffs Davis, Clady, and Vega ("Firemen Plaintiffs") are employed by Defendant County of Los Angeles as firemen in the Los Angeles County Fire Department. Plaintiffs Davis, Clady, and Vega have been employed as firemen for approximately 19 years, 3 years, and 13 years, respectively, and bring this action on behalf of themselves and on behalf of a class composed of all persons who are either black or Mexican-American and who presently are or will become employed as firemen by the County of Los Angeles.

6. *Applicant Plaintiffs.* Plaintiffs Bursey, Harris, Smith, Clady, Haynes, Tucker, Aubry, Crawford, Heard, Baltazar, Amparan ("Applicant Plaintiffs") are either black or Mexican-American citizens of the United States who applied for employment as Los Angeles County firemen in 1971, who, in January 1972, took a written examination for that job, and who currently are listed on an eligibility list of persons seeking appointments as Los Angeles County firemen. These eleven Plaintiffs bring this action on behalf of themselves and on behalf of a class composed of all persons who are either black or Mexican-American and who are current or future applicants for employment as Los Angeles County firemen.

7. *Classes Represented.* Members of each of the classes on whose behalf plaintiffs sue are so numerous

that joinder of all such members is impracticable. There are common questions of law and fact affecting the rights of the members of each of the classes. The claims of the named plaintiffs are typical of the claims of the classes they represent, and Plaintiffs will fairly and adequately protect the interests of the classes they represent. The prosecution of separate actions against Defendants by individual members of the represented classes would create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for the Defendants. Defendants have acted and have refused to act on grounds generally applicable to the classes Plaintiffs represent, thereby making appropriate preliminary and final injunctive relief in favor of Plaintiffs and the classes they represent.

8. *Illegal Practices.* Defendants and each of them have for many years pursued employment practices that illegally discriminate against black and Mexican-American firemen and black and Mexican-American applicants for positions as Los Angeles County firemen. Defendants have implemented these illegal practices, among other ways, by:

(a) engaging in nepotistic and "word-of-mouth" recruitment procedures, at least until 1969, which operated to perpetuate the virtually all-white work force of the Los Angeles County Fire Department.

(b) utilizing written tests as a promotion and hiring selection device, despite the fact that such written tests are culturally biased and have a

severely disproportionate detrimental impact upon black and Mexican-American applicants as compared to whites, and despite the fact that such written tests have not been shown to be required by the needs of the Los Angeles County Fire Department nor related to or predictive of job performance as firemen.

(c) utilizing oral examinations as a hiring selection device, despite the fact that such oral examinations were administered almost exclusively by whites and had a disproportionate detrimental impact upon black applicants, despite the fact that the officials of Defendant agencies who administer and score the oral examinations had no objective instructions or standards by which to administer the oral examinations, and despite the fact that the oral examinations have not been shown to be predictive of job performance.

(d) utilizing other procedures, practices, qualifications, tests, standards, and selection devices in recruitment and hiring which have a disproportionate detrimental impact upon black and Mexican-American applicants as compared to whites and which never have been shown to be predictive of job performance as firemen.

(e) refusing to take appropriate action to correct the effects of past racially discriminatory policies and practices.

9. *Cessation of Certain Illegal Practices.* As a direct result of the filing of the original complaint herein on January 11, 1973, and only because of such filing, Defendants altered their previous plans and ceased to utilize the culturally biased written examination form-

erly utilized as a ranking device in selecting firemen applicants. Defendants, instead, turned to oral interviews as the sole procedure for ranking applicants; as a consequence, for first time in Defendants' history, the ranking procedure used for selecting firemen did not have a disproportionate detrimental impact upon black and Mexican-American applicants. Due to the change in selection procedures, a substantial number of minorities have been placed at or near the top of the eligibility list of current applicants for hire as Los Angeles County firemen, with the result that, subject to medical examinations now being carried out, it is anticipated that there will be approximately thirty-three minority persons among the first class of inductees which will total sixty persons.

10. *Continuation of other Illegal Discriminatory Practices.* Although Defendants have ceased to utilize the discriminatory written examination, and although approximately 33 out of the first class of sixty inductees probably will be minority persons, Defendants have not stopped all of their discriminatory practices relative to the Los Angeles County Fire Department. Most importantly, Defendants have failed and continue to refuse to take steps which would, within a reasonable time, eliminate the presently existing effects of past discrimination. Defendants have refused and continue to refuse to make commitments to overcome past discrimination in future years on future examinations, and future eligibility lists. More immediately, in the 240 slots on the current eligibility list which follow

the top sixty slots, said 240 slots being those from which future classes of inductees will be selected, there are relatively few blacks and Mexican-Americans and certainly not a number of such minorities as would be sufficient to overcome the presently existing effects of Defendants' past discriminatory practices.

11. *Irreparable Injury.* Unless preliminary and permanently enjoined, Defendants may reinstitute the discriminatory practices described above in paragraph 9, and will continue the other discriminatory practices described above in paragraph 8 and 10 of this Amended Complaint. Plaintiffs will be irreparably injured thereby and have no adequate remedy at law.

12. *Necessity of Preliminary Injunction.* Applicant Plaintiffs and the class they represent will be irreparably injured unless Defendants are preliminarily enjoined from continuing to refuse to take those steps necessary to overcome the present effects of past discrimination as that failure relates to induction of the classes of fireman trainees to be inducted from the current eligibility list subsequent to the first class of sixty trainees; in particular the applicant Plaintiffs will be injured irreparably unless Defendants are preliminarily enjoined from failing and refusing to appoint or hire, in those subsequent classes of firemen trainees, a sufficient number of black and Mexican-American fireman trainees on an accelerated basis as is necessary to overcome the effects of past discriminatory practices based on race and national origin.

13. *Civil Rights Violated.* The above-described discriminatory employment practices based on race and national origin constitute a violation of those portions of the Civil Rights Act of 1866 found at 42 U.S.C. §1981, for which violation Defendants are liable in an action in equity under 42 U.S.C. §1983. In addition, the above-described discriminatory employment practices deprive Plaintiffs and the classes they represent of rights guaranteed by the Fourteenth Amendment to the Constitution of the United States, and by Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e *et seq.*

WHEREFORE, Plaintiffs pray that Defendants and each of them and their officials, agents, employees, and all persons in active concert or participation with them be preliminarily and permanently enjoined from engaging in any discriminatory employment practices based on race or national origin relating to the Los Angeles County Fire Department, and specifically from:

a. Failing or refusing to recruit blacks and Mexican-Americans for jobs as Los Angeles County firemen on an equal basis with whites.

b. Utilizing written tests, oral examinations, and other selection devices or standards concerning hiring which disproportionately exclude blacks and Mexican-Americans from jobs as Los Angeles County firemen and which are not predictive of job performance.

c. Failing or refusing to eliminate written tests, oral examinations, or other selection devices or standards used for promotion purposes in the Los

Angeles County Fire Department which have a disproportionate detrimental impact upon blacks and which have not been shown to be predictive of job performance.

d. Failing or refusing to establish valid practices, procedures, qualifications, tests or other devices and standards which would prevent continuing discrimination in recruitment, hiring, and promotion of Los Angeles County firemen.

e. Failing or refusing to take appropriate measures to overcome the present effects of past discriminatory policies and practices, including the following affirmative steps:

(1) conducting a recruitment program designed to inform the black and Mexican-American communities of employment opportunities available in the Los Angeles County Fire Department.

(2) hiring sufficient black and Mexican-American applicants for jobs as firemen on an accelerated basis as is necessary to overcome the presently existing effects of past discriminatory employment practices based on race and national origin.

(3) providing monetary compensation to black and Mexican-American applicants and present firemen for the monetary losses they have suffered as a result of Defendants' failure and refusal to hire and employ them on an equal basis with whites.

(4) taking such other reasonable action as is necessary to overcome the present and future effects of past discriminatory actions and practices.

Plaintiffs further pray that this Court grant such other and further relief as the interests of justice require, including Plaintiffs' costs and disbursements herein and Plaintiffs' reasonable attorneys' fees.

MARY D. NICHOLS
CARLYLE W. HALL, JR.
JOHN R. PHILLIPS
BRENT N. RUSHFORTH
FREDRIC P. SUTHERLAND

/s/ By Mary D. Nichols
Mary D. Nichols
Attorneys for Plaintiffs

DATED: April 16, 1973.

APPENDIX B.

**Answer to Second Amended Complaint for Injunction
in Connection With Employment Practices of Los
Angeles County.**

United States District Court, Central District of California.

Van Davis, et al., Plaintiffs, vs. County of Los Angeles, Board of Supervisors of the County of Los Angeles, and Civil Service Commission of the County of Los Angeles, Defendants. Civil No. 73-63-WPG.

Filed: 4-26-73.

Come now defendants COUNTY OF LOS ANGELES, BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES, and the CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES and answering the Second Amended Complaint herein admit, deny or allege as follows:

1. Defendants admit the allegations of paragraph 1 of the Second Amended Complaint, without conceding that a cause of action is stated in that plaintiffs have the right to maintain this action.

2. In answer to the allegations of paragraph 2, defendants admit the allegations of said paragraph, except those relating to the composition of the Los Angeles County Fire Department. In this regard defendants specifically allege that there are presently 1,844 firemen employed by the County of Los Angeles, of which 9 are black and 59 are Mexican-American.

3. Defendants admit the allegations of paragraphs 3 and 4 of the Second Amended Complaint.

4. Defendants admit the allegations of paragraph 5, without conceding, however, that said class action

may properly be maintained by the plaintiffs named therein.

5. In answer to paragraph 6, defendants deny that plaintiffs STEPHEN HAYNES and JAMES HEARD applied for employment as Los Angeles County firemen. Defendants further deny that plaintiff ALFRED R. BALTAZAR is currently listed on the eligibility list of persons seeking employment as Los Angeles County firemen. Except as so denied, the defendants admit the other allegations of said paragraph without conceding, however, that said class action may properly be maintained by the plaintiffs named therein.

6. Defendants deny, conjunctively and disjunctively, each and every allegation of paragraph 7 of the Second Amended Complaint.

7. In answer to the allegations of paragraph 8, defendants deny, generally and specifically, conjunctively and disjunctively, each and every allegation of said paragraph and its sub-paragraphs. In regard to said allegations, the defendants allege that the defendants have taken affirmative action since at least 1970 to correct any racial imbalance in the fire department and to recruit for hire as firemen blacks, Mexican-Americans, and other minorities.

8. In answer to the allegations of paragraph 9, defendants admit that the present examination procedure for selecting firemen is not discriminatory and does not have a disproportionate, detrimental impact upon black and Mexican-American applicants, and further admit that through the current examination procedures a substantial number of minorities have been placed at or near the top of the eligibility lists of current applicants for hire as Los Angeles County

firemen. Defendants specifically deny that as a direct result of, and only because of the filing of the original Complaint herein, that they have altered their previous plans or examination procedures. Defendants further specifically deny that at any time their examination procedures had a disproportionate detrimental impact on black and Mexican-American applicants.

9. In answer to the allegations of paragraph 10, the defendants admit that they do not utilize a discriminatory written examination and that approximately 33 out of the first class of 60 hired probably will be minority persons. Except as so admitted, the defendants deny generally and specifically, conjunctively and disjunctively, each and every allegation of said paragraph.

10. In answer to the allegations of paragraphs 11, 12, and 13, the defendants deny generally and specifically, conjunctively and disjunctively, each and every allegation of said paragraphs.

FIRST AFFIRMATIVE DEFENSE

As a first, separate and affirmative defense, the defendants allege that plaintiffs' Complaint fails to state a claim upon which relief can be granted under 42 U.S.C. 1981 and 1983.

SECOND AFFIRMATIVE DEFENSE

As a second, separate and affirmative defense, the defendants allege that plaintiffs' Complaint fails to state a claim upon which relief can be granted under Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e, et seq.

THIRD AFFIRMATIVE DEFENSE

As a third, separate and affirmative defense, the defendants allege that plaintiffs' Complaint fails to state a claim upon which relief can be granted under 42 U.S.C. 1981 and 1983, in that the named defendants are not "persons" within the scope of that statute, and therefore are not the proper parties against whom such a suit may be brought.

FOURTH AFFIRMATIVE DEFENSE

As a fourth, separate and affirmative defense, the defendants allege that said action under 42 U.S.C. 1981 and 1983 is barred by the applicable statute of limitations because the alleged discriminatory acts occurred more than three years immediately prior to the filing of the Complaint herein.

FIFTH AFFIRMATIVE DEFENSE

As a fifth, separate and affirmative defense, the defendants allege that said action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e, et seq., is barred because said alleged discriminatory acts occurred prior to the date that said statute became effective and applicable to the defendants herein, to wit, March 24, 1972.

SIXTH AFFIRMATIVE DEFENSE

As a sixth, separate and affirmative defense, the defendants allege that plaintiffs had notice of all of the facts and acts of the defendants set forth in the Complaint and nevertheless refrained from commencing this action until January 11, 1973, to the prejudice of the defendants and plaintiffs have thereby been guilty of such laches as should in equity bar the plaintiffs from maintaining this action.

SEVENTH AFFIRMATIVE DEFENSE

As a seventh, separate and affirmative defense, the defendants deny that the persons the plaintiffs purport to represent as a class do in fact constitute a single class, and further deny that said plaintiffs are members of the class they purport to represent.

EIGHTH AFFIRMATIVE DEFENSE

As an eighth, separate and affirmative defense, defendants allege that the relief sought herein in the nature of the hiring of black and Mexican-American applicants for jobs as firemen on an accelerated basis is unjustified under the facts herein, is contrary to the law, violates the Los Angeles County Civil Service regulations, and would constitute, if implemented, not only a violation of the due process clause of the United States Constitution, but also the provisions of 42 U.S.C. 1981 and 1983, and the Civil Rights Acts of 1964, 42 U.S.C. section 2000e, et seq. in regard to future applicants as firemen, who are not blacks and Mexican-Americans.

WHEREFORE, defendants pray that the preliminary and permanent injunctions prayed for by the plaintiffs be denied, that plaintiffs take nothing in this action, and that defendants be awarded their costs of suit herein, and such other and further relief as the Court deems proper.

JOHN H. LARSON

Acting County Counsel

/s/ by William F. Stewart

WILLIAM F. STEWART

Deputy County Counsel

Attorneys for Defendants

APPENDIX C.

Pre-Trial Order.

United States District Court, Central District of California.

Van Davis, *et al.*, Plaintiffs, v. County of Los Angeles, *et al.*, Defendants. Civil Action No. 73-63-WPG.

Counsel for the Parties to this action have met together to prepare this proposed order, which is hereby submitted for the Court's approval.

Attached hereto are the following schedules for use in the trial of this case:

- (1) Joint Statement of Issues to be Tried;
- (2) Stipulated Facts;
- (3) Plaintiffs' Statement of Material Facts and Relevant Law;
- (4) Defendants' Statement of Material Facts and Relevant Law;
- (5) Plaintiffs' Witness List;
- (6) Defendants' Witness List;
- (7) Plaintiffs' Exhibit List;
- (8) Defendants' Exhibit List;
- (9) Plaintiffs' Concise Statement as to Relief Sought;
- (10) Intervenor's Concise Statement as to Relief Sought;
- (11) Intervenor's Witness List;

The parties, through their attorneys, agree that they are bound by the Statement of Issues to be Tried and the Stipulated Facts as set forth in the attached Schedules "(1)" and "(2)". The parties also agree that the other Schedules, number "(3)" through "(10)",

although not strictly binding on the parties, shall serve as a guide to assist the Court and the attorneys in the conduct of the trial.

DATED: June 1, 1973

A. THOMAS HUNT
CARLYLE W. HALL, JR.
MARY D. NICHOLS
JOHN R. PHILLIPS
BRENT N. RUSHFORTH
FREDRIC P. SUTHERLAND
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DANIEL FOGEL

STEPHEN REINHARDT
LOREN R. ROTHSCHILD
/s/ By Stephen Reinhardt
Stephen Reinhardt

Attorneys for Intervenor

IT IS SO ORDERED.

Dated: June 5, 1973.

/s/ William P. Gray

UNITED STATES DISTRICT JUDGE

Schedule One (1): JOINT STATEMENT OF
ISSUES TO BE TRIED

1. Whether or not, as a question of fact and law, Defendants have engaged in employment practices violative of 42 U.S.C. §§1981, 1983, and/or 2000 *e et seq.*, as concerns past and present black and Mexican-American applicants for employment as firemen at the Los Angeles County Fire Department.

2. Whether or not Defendants have interfered with affirmative action efforts designed to increase minority participation rates in the workforce of Los Angeles County, in violation of 42 U.S.C. §§1981, 1983, and 2000e, *et seq.*

3. To what relief, if any, are Plaintiffs entitled if the Court determines that the answer to either issue number one (1) or issue number two (2) is in the affirmative.

4. Whether Plaintiffs' cause of action and/or the particular remedies sought herein under 42 U.S.C. §§ 1981, 1983, and 2000e *et seq.* are barred by an applicable statute of limitations.

The Parties agree that the following issues will not be tried:

1. Whether Defendants' promotional employment practices are violative of 42 U.S.C. §§1981, 1983, and/or 2000e *et seq.*, as concerns past and present black and Mexican-American employees at the Los Angeles County Fire Department.

2. Whether Plaintiffs, or any members of the class they represent, are entitled to back pay.

The Parties agree that by entering into this Pre-Trial Order:

1. Defendants are in no way prejudiced as to their assertion that this action may not be maintained as a class action, or their assertion that this action may not be maintained pursuant to 42 U.S.C. §§1981, 1983, and 2000e *et seq.*

2. Individual members of the classes represented by Plaintiffs are in no way prejudiced as to any claims for back pay or other relief relating specifically to them as individuals they may make in actions other than the one instantly before this Court.

Schedule Two (2):
STIPULATED FACTS

The Parties hereto, by their attorneys, stipulate as follows, each reserving the right to object to or argue as to the relevancy of these stipulated facts:

I. *Background Facts.*

1. Defendant County of Los Angeles, Defendant Los Angeles County Board of Supervisors, and Defendant Los Angeles County Civil Service Commission are governmental entities established pursuant to the laws and the Constitution of the State of California. The Los Angeles County Government performs many functions as an administrative agent of the State of California, including the provision of fire prevention and fire protection services in certain fire districts located within the geographical boundaries of Los Angeles County. These services are performed by Defendant County of Los Angeles through its fire department, known as the Los Angeles County Fire Department. ("Fire Department").

2. The authorized strength of the Fire Department is approximately 1980 firemen, although normally ap-

proximately 1,900 firemen are employed. The present work force consists of 1,762 firemen, of whom approximately nine are black and 50 are Mexican-American. For purposes of this litigation, Defendants are considered to have an additional 60 probationary firemen, of whom 20 are Mexican-American and 10 are black. Normally approximately 100 firemen are hired each year at the Fire Department. At the present time, however, in addition to the 100 vacancies expected within the next year, there are approximately 78 vacancies.

3. In Los Angeles County, there are 7,032,075 inhabitants, of whom 762,844 (10.8%) are black and 1,289,311 (18.3%) are Mexican-American.

4. Plaintiffs Van Davis and Hershal Clady are black citizens of the United States. Plaintiff Fred Vega is a United States Citizen who is Mexican-American. Plaintiffs Davis, Clady, and Vega are employed by Defendant County of Los Angeles as firemen in the Los Angeles County Fire Department. Plaintiffs Davis, Clady, and Vega have been employed as firemen for approximately 19 years, 3 years, and 13 years, respectively.

5. Plaintiffs Bursey, Harris, Smith, Clady, Tucker, Aubry, Crawford, Amparan are either black or Mexican-American citizens of the United States who applied for employment as Los Angeles County firemen in 1971, who, in January 1972, took a written examination for that job, and who currently are listed on an eligibility list of persons seeking appointments as Los Angeles County firemen.

II. Recruitment.

6. The Los Angeles County Personnel Office is charged with the responsibility for allocating money

and personnel for advertising and recruitment for all Los Angeles County employment positions, including the position of fireman with the Los Angeles County Fire Department.

7. At the time the written examination for the fireman position was administered in 1968, there were 656 whites, 14 blacks and 13 Mexican-Americans who took the written exam.

8. For the year 1969 when applications were next taken, approximately 25% of those who applied were black and Mexican-American. In the next year when applications were taken, 1971, 11.6% of the applicants applying were black and 12.8% were Mexican-American for a total of 24.4%.

III. Written Test 1968 and 1969.

9. The Los Angeles County Personnel Department has for several years devised and administered a written test which has been used as a weighted ranking device for the selection of candidates for fireman positions. This written examination was used as a ranking and selection device for every class of firemen until the selection of the current class of firemen took place. (See ¶ 15, *infra*)

10. Privately published books called "ARCO" books are in existence and are designed to assist in preparing for the written examination. Applicants are not officially informed of the existence of the ARCO books.

11. Of the 656 whites, 14 blacks and 13 Mexican-Americans who took the written test in 1968, three Mexican-Americans and no blacks were hired.

12. In 1969, the written test was administered to 1,080 whites, 244 blacks and 100 Mexican-Americans. The combined weight of the scores on the written

and physical agility examinations determined qualification for oral interviews. The basic results of that 1969 examination were as follows:

	<i>took written</i>	<i>were hired</i>
whites	1,080	175
blacks	244	5
Mexican-Americans	100	7

13. The written test in 1969 resulted in the following mean and median scores, by race:

(a) Mean Scores:

(1) ultimate hires	82.92
(2) all whites	71.61
(3) all blacks	58.16
(4) all Mexican-Americans	64.53

(b) Median Scores

(1) ultimate hires	82.27
(2) all whites	73.41
(3) all blacks	55.00
(4) all Mexican-Americans	65.91

14. The distribution of scores, by race, for the 1969 written test was as follows:

(a) Scored 49.99 or below

(1) whites	45
(2) blacks	75
(3) Mexican-Americans	9
Total	129

(b) Scored 50 to 59.99

(1) whites	157
(2) blacks	71
(3) Mexican-Americans	26
Total	254

(c) 60.00 to 69.99

(1) whites	246
(2) blacks	50
(3) Mexican-Americans	27

Total 323

(d) 70.00 to 79.99

(1) whites	313
(2) blacks	35
(3) Mexican-Americans	27

Total 375

(e) 80 and above

(1) whites	319
(2) blacks	13
(3) Mexican-Americans	11

Total 343

15. Of the 1300 applicants who took the written test and the physical agility test in 1969, the top 407 were called for oral interviews. The racial make-up of that group of 407 included 19 blacks and 14 Mexican-Americans. The written test had a weighted value of 35% in determining each applicant's total score on the eligibility list.

16. No studies establishing the validity of the written entrance tests have been conducted according to the procedures set forth in the Equal Employment Opportunity Commission Guidelines, 29 CFR §1607, 35 Fed. Reg. 12333 (August 1, 1970).

IV. Oral Interviews.

17. Oral interviews traditionally have been utilized by Defendants as a weighted part of the ranking and selection procedure. These interviews usually are conducted by several teams, each consisting of a member

of the Los Angeles County Personnel Department and a member of the Los Angeles County Fire Department.

18. There are no available statistics indicating whether the oral interview procedure used in 1969 and prior years, had a different impact on black and Mexican-American applicants as compared to whites. It did not have a disproportionate detrimental impact for the current class of applicants.

19. No studies establishing the validity of the oral interviews have been conducted.

V. *Height Standards.*

20. Prior to 1971 the minimum height requirement for applicants for fireman positions was 5'8". The minimum height requirement for applications taken in 1971 was 5'7".

21. No studies have been conducted establishing the validity of the height standards.

VI. *Current Examination.*

22. In January of 1972, applicants for positions as firemen were required to take a written test. Of those 2,414 who took the test, 1904 were white, 196 were black and 283 were Mexican-American. Of those who took the written examination, 1,885 whites, 170 blacks and 283 Mexican-Americans passed.

23. Those applicants who scored among the top 544 were ranked and were selected for oral interviews which commenced on January 3, 1972. Of the 544 who were to be [WFS] interviewed, 492 were white, 10 were black, and 33 were [WFS] Mexican-American, and 9 were of other races. The decision was made by Defendants on January 8, 1972 to discontinue their original plan to orally interview only those who ranked

among the top 544 on the written examination, and a new procedure was implemented whereby all of the applicants, with the exception of those 75 persons who had scored in the bottom 3.1%, would be orally interviewed. This new procedure commenced on January 20, 1973.

24. In January, February and March, 1973, 1,468 applicants who filed for openings in 1971, and who had fulfilled other requirements except a medical examination, were orally interviewed for jobs as Los Angeles County firemen. 101 were black, 159 were Mexican-American, 19 of other races, with 1,189 whites. The 1,468 were ranked on an eligibility list. Of the top 315 on the eligibility list, 210 are white, 39 are black, 59 are Mexican-American, and 7 are of other races. This procedure of ranking applicants by oral interview did not have a detrimental disproportionate impact upon black and Mexican-American applicants.

Schedule Three (3): PLAINTIFFS' STATEMENT OF MATERIAL FACTS AND RELEVANT LAW

- (1) *Intent.* Until this lawsuit was commenced, Defendants were in the process of using a culturally biased written examination as a device for eliminating from consideration for hire all but 544 of 2,414 who took the written test. Officials of Defendants had known for more than one and one-half years that this procedure was illegal since it had a severe disproportionate detrimental impact upon minorities and had not been validated. Nevertheless those officials stopped the use of this written test as a device for eliminating most applicants, only because they learned this lawsuit

was about to be commenced. Defendants then ceased consideration of the written test, except as a device for eliminating those applicants scoring in the bottom 75 (or 3.1%). The continued knowing use of an illegal procedure goes far beyond the showing of intent which the law requires. *Rowe v. General Motors*, 457 F.2d 348, 355, (5th Cir., 1972); *Local 189, United Papermakers v. United States*, 416 F. 2d 980, 996-97 (5th Cir., 1969), *cert. denied*, 397 U.S. 919 (1970); *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413, 448 (S.D. Ohio 1968).

- (2) *Statistics*. Of the 1762 firemen currently employed by Defendants in the Los Angeles County Fire Department, only nine are black and only 50 are Mexican-American. The law is settled that in cases involving racial discrimination, "statistics often tell much, and Courts listen." *Alabama v. United States*, 304 F. 2d 583, 586 (5th Cir., 1962), *aff'd per curiam*, 371 U.S. 37 (1962).

In employment discrimination cases it consistently has been held that where statistical evidence reveals a severe disproportion between the percentage of minority employees and the percentage of minorities residing within the relevant geographical area in which the employer is located, a *prima facie* case of discrimination is established. See, e.g. *United States v. Local 86, Ironworkers*, 315 F. Supp. 1202, 1236 (W.D. Wash., 1970), *aff'd* 443 F. 2d 544, 551 (9th Cir., 1971), *cert. denied*, 404 U.S. 984 (1971); *United States v. Hayes International Corp.*, 456 F. 2d 112, 120 (5th Cir., 1972); *Parham v. Southwestern Bell*

Telephone Co., 433 F. 2d 421, 426 (8th Cir., 1970).

- (3) *Recruitment*. Prior to 1969, virtually no effort was made by Defendants to recruit blacks or Mexican-Americans for Fire Department jobs. In 1968, 656 whites, 14 blacks and 13 Mexican-Americans took Defendants' written examination. It is unlawful for an employer with a paucity of minority employees to rely upon "word-of-mouth" recruitment practices or other recruitment practices which result in whites being actively recruited while little or no effort is made to recruit minorities. *U.S. v. Local 86, Ironworkers*, 315 F. Supp. 1202, 1235, (W.D. Wash., 1970) *aff'd*, 443 F. 2d 544 (9th Cir., 1971), *cert. denied* 404 U.S. 984 (1971). See also *U.S. v. Local 73, Plumbers and Pipefitters*, 314 F. Supp. 160, 163 (S.D. Ind. 1969).

- (4) *Illegal Written Entrance Tests*. No statistics are available, for the years prior to 1968, which show the number of minority applicants who took and passed or failed Defendants' written entrance examinations for fireman jobs. In 1968, of the 14 blacks and 13 Mexican-Americans who took the written examination, only three of the Mexican-Americans were hired. In 1969, 35% of the whites taking the test scored high enough to move to the next step in the hiring Mexican-Americans.

A written test was administered in 1972 to those applicants applying in 1971. Until Defendants learned of the instant lawsuit, Defendants had intended to use that written test as a device to eliminate all but the top 544 of 2,414 persons taking the written exam. If this had been done

it would have had a severe disproportionate detrimental impact upon blacks and Mexican-Americans, in that 25.8% of the whites taking the 1972 written test scored in the top 544, as compared to 5.1% of the blacks and 11.6% of the Mexican-Americans taking the exam.

No studies have been conducted by Defendants showing that these written tests relate to job performance. If a hiring test operates to exclude minority applicants disproportionately as compared to whites, as Defendants' written tests clearly did, the test is illegal unless it has been shown by Defendants to relate statistically to job performance. *Griggs v. Duke Power Company*, 401 U.S. 424, 431-32 (1971); *U.S. v. Local 86 Ironworkers*, 315 F. Supp. 1202, 1236 (W.D. Wash., 1970); *aff'd*, 443 F. 2d 544 (9th Cir., 1971), *cert. denied*, 404 U.S. 984 (1971); *Chance v. Board of Examiners*, 458 F. 2d 1167, 1174 (2d Cir., 1972); *United States v. Jacksonville Terminal Co.*, 451 F. 2d 418, 456 (5th Cir., 1971), *cert. denied*, 406 U.S. 906 (1972); *Western Addition Community Organization v. Alioto*, 340 F. Supp. 1351, 1356 (N.D. Cal., 1972), See also EEOC, 29 C.F.R. §§1607-1607.14 (1972).

- (5) *Height Requirements*. Defendants, since 1971, have required all applicants for fireman positions to be 5'7" tall. Before 1971, the height requirement was 5'8". No study has ever been made to show that the height standard to job performance. At trial Plaintiffs will show that these standards disproportionately exclude Mexican-American applicants as compared to whites, in that

the 5'7" standard eliminates approximately 41% of the Mexican-American applicants as compared to 15% of the white applicants. Under these circumstances the height standard is illegal. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *Meadows v. Ford Motor Company*, F. Supp., 5 E.P.D. ¶8468 (W.D. Ky., 1973), (weight-sex discrimination); EEOC Decision No. 72-0284, August 9, 1971, *CCH Fair Empl. Prac. Guide*, ¶6304, at 4545-46; EEOC Decision No. 71-2643, June 25, 1971, *CCH Fair Empl. Prac. Guide*, ¶6286 (sex discrimination); EEOC *Guidelines on Discrimination because of National Origin*, 29 C.F.R. §1606.1 (1972); United States Department of Justice, *Guidelines on Minimum Height Requirements, Law Enforcement Assistance Administration*, 38 Federal Register 6415 March 9, 1973, found at *CCH Fair Empl. Prac. Guide*, ¶5138.

- (6) *Affirmative Action*. Several persons have engaged in affirmative action efforts for the purpose of increasing the minority employment participation rate at the Los Angeles County Fire Department. Officials of Defendants have interfered with such efforts. Such interference constitutes a violation of law. *United States v. Local 169, Carpenters*, 457 F. 2d 210, 217-20 (7th Cir., 1972), *cert. denied*, U.S. (1973).
- (7) *"ARCO" Books*. There are certain books, known as "ARCO" books, which private companies publish, and which assist applicants in taking the fire department entrance exams. Persons familiar with civil service commission procedures are more likely to know of the existence of these books. Applicants for Fire Department jobs are not informed

of the existence of these books. Since there are virtually no minorities in the Fire Department, white friends and relatives of incumbent firemen have an advantage not afforded minority applicants who have no way of learning of the existence of the "ARCO" books. Such a nepotistic practice which operates to exclude minorities violates the law. *United States v. Local 86, Ironworkers*, 315 F. Supp. 1202, 1235 (W.D. Wash., 1970) *aff'd* 443 F. 2d 544 (9th Cir., 1971), *cert. denied* 404 U.S. 984 (1971); *Local 53, Asbestos Workers v. Vogler*, 407 F. 2d 1047, 1054 (5th Cir., 1969).

- (8) *Reputation*. Plaintiffs will show at the trial that Defendants have a bad reputation in the minority communities of Los Angeles, as far as discriminatory employment practices are concerned. The law imposes a burden upon employers to take affirmative action to vitiate the effects of a discriminatory reputation in minority communities. *United States v. Local 86, Ironworkers*, 315 F. Supp. 1202, 1236-37 (W.D. Wash., 1970) *aff'd* 443 F. 2d 544 (9th Cir., 1971), *cert. denied*, 404 U.S. 984 (1971); *Carter v. Gallagher*, 452 F. 2d 315, 331 (8th Cir., 1971), *cert. denied*, 406 U.S. 950 (1972).
- (9) *Cessation of Use of Discriminatory Written Test*. As noted above, when Defendants learned that commencement of this class action lawsuit was imminent, Defendants in effect discontinued use of their written test as a ranking or screening device for applicants for hire at the Los Angeles County Fire Department. It is settled law that employers cannot escape legally required Court-ordered accelerated hiring merely by ceasing to

discriminate upon learning of an impending lawsuit. *United States v. Local 86, Ironworkers*, 315 F. Supp. 1202, 1235 (W.D. Wash., 1970), *aff'd* 443 F.2d 544 (9th Cir., 1971), *cert. denied* 404 U.S. 984 (1971); *Local 53, Asbestos Workers v. Vogler*, 407 F. 2d 1047, 1055 (5th Cir., 1969); *United States v. Local 73, Plumbers and Pipefitters*, 314 F. Supp. 160, 163 (S.D. Ind., 1969); *United States v. Local 38, IBEW*, 428 F. 2d 144, 151 (6th Cir., 1970) *cert. denied* 400 U.S. 943 (1970). See also *Lankford v. Gelston*, 364 F. 2d 197, 203 (4th Cir., 1966).

- (10) *Evidence of Past Discrimination*. Plaintiffs anticipate that Defendants will contend at trial that evidence of discrimination which occurred before the effective date of Title VII, and/or before the statute of limitations cut-off date, is not admissible. Such a position is contrary to the established law. See e.g. *United States v. Local 1, Ironworkers*, 438 F. 2d 679, 683 (7th Cir., 1971); *United States v. Local 38, IBEW*, 428 F. 2d 144 (6th Cir., 1970) *cert. denied* 400 U.S. 943 (1970); *Local 189, United Papermakers v. U.S.*, 416 F. 2d 980 (5th Cir., 1969) *cert. denied* 397 U.S. 919 (1970); *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413, 443-44 (S.D. Ohio 1968); and cases cited therein.
- (11) *Remedy*. Plaintiffs seek the imposition of an order requiring Defendants to hire one black and one Mexican-American, for each white hired. The appropriateness and legality of this relief is fully discussed in Plaintiffs' Trial Memorandum submitted concurrently with this Pre-Trial Order. That memorandum makes it clear that accelerated hiring

is not only appropriate, but has come into widespread and accepted use as the preferred method of erasing the effects of past discrimination. As is fully discussed in the Trial Memo, unless this Court grants the accelerated hiring relief sought by Plaintiffs, the effects of past discrimination will continue to be felt for the remainder of this century. The black and Mexican-American communities of Los Angeles County are entitled to have their rights vindicated within a more reasonable period of time.

Schedule Four (4): DEFENDANTS' STATEMENT OF MATERIAL FACTS AND RELEVANT LAW

Defendants will set forth in their Trial Memorandum their statement of material facts and relevant law.

Schedule Five (5): PLAINTIFFS' WITNESS LIST

1. Gordon Nesvig
2. Chief Barlow
3. Harold McCann
4. Charles Crane
5. Dr. James Kirkpatrick
6. Dr. B. J. Williams
7. Hershel Clady
8. Van Davis
9. Edward Rivera
10. Dr. Bernard Karpinos

Schedule Six (6): DEFENDANTS' WITNESS LIST

1. Gordon Nesvig
2. Chief Houtz
3. Eliot Marcus
4. Chief Meagher
5. Chief Yoder
6. Chief Collins
7. Michael Eier

Schedule Seven (7):

PLAINTIFFS' EXHIBIT LIST

1. Memo *re* chronology of Fireman Examination.
2. Memo from Nesvig dated 12/1/72.
3. Memo *re* Statistical Breakdown of Firemen Candidates.
4. Memo from Nesvig dated 1/16/73.
5. Memo from Nesvig dated 5/19/71.
6. Letter from Nesvig dated 9/30/71.
7. Memo from Nesvig dated 6/20/72.
8. Memo from Nesvig dated 7/14/72.
9. Memo from Nesvig dated 1/17/69.
10. Bulletin announcing 1971 application date.
11. Minority Recruitment Bulletin.
12. Memo from Nesvig dated 7/7/72.
13. Report of Los Angeles County Task Force to Study the County's Affirmative Action Program.
14. Personnel File of Harold McCann.
15. Job Description ("class specification") of Fireman position.
16. Written Tests Administered in 1967, 1969, and 1971.
17. Two Charts Concerning Height of Mexican-Americans as Compared to Whites.
18. Copy of Article from Journal of American Anthropology Authors Trotter and Glessner.
19. "ARCO" Books.

Schedule Eight (8):

DEFENDANTS' EXHIBIT LIST

1. County of Los Angeles Civil Service Regulations.
2. List of Organizations for recruitment brochures.
3. County of Los Angeles Affirmative Action Plan.

Schedule Nine (9):

CONCISE STATEMENT AS TO
RELIEF SOUGHT BY PLAINTIFFS

The basic relief sought by Plaintiffs in this action is an order requiring Defendants to hire one qualified black and one qualified Mexican-American, for each white hired at the Los Angeles County Fire Department, until such time as the percentage of blacks and Mexican-Americans in the workforce equals the percentage of blacks and Mexican-Americans in the general population of Los Angeles County. As is fully discussed in the Trial Memorandum filed by Plaintiffs concurrently with this Pre-Trial Order, such relief is necessary in order to eliminate within a reasonable number of years, the presently existing effects of past discrimination.

If the Court determines, after trial, that such an injunction should issue requiring Defendants to engage in accelerated hiring of qualified blacks and qualified Mexican-Americans, pursuant to set numerical ratios, Plaintiffs seek only the limited further relief that Defendants be required to engage in good faith recruitment efforts in the relevant minority communities, that Plaintiffs receive periodic progress reports showing whether the goals are being met, and that Plaintiffs receive

reasonable costs and attorneys fees. Plaintiffs do not seek extensive further relief because although many of the Defendants' recruitment and hiring procedures and standards have operated to exclude qualified minorities disproportionately in the past, if a set numerical hiring goal of qualified minorities is required, all that Plaintiffs seek will be achieved. Whatever practices and procedures Defendants wish to use in selecting the qualified firemen will be immaterial as long as the hiring ratio is met. Plaintiffs are interested in results, not procedures. The only desired result is that the effects of past discrimination be eliminated within a reasonable number of years. Therefore, if the Court orders the relief sought by Plaintiffs, Defendants will be entirely free to follow any procedures and practices they consider necessary to select qualified firemen.

Plaintiffs are willing to limit the relief sought in this manner because there is a relevant population of more than 29% blacks and Mexican-Americans, and because the parties have estimated that under a two for one ratio, only approximately 66 minorities would be hired each year. Under such circumstances, therefore, regardless of the procedures and standards applied, as long as those procedures and standards are at all reasonable, Defendants will have no difficulty in fulfilling the hiring goals sought by Plaintiffs.

Schedule Ten (10):

INTERVENOR'S CONCISE
STATEMENT AS TO RELIEF SOUGHT

It is the Intervenor's position that in the event that the Court issues any order which affects the hiring of personnel for the Fire Department that such order should include specific provisions directing that (1)

the standards and criteria for employment are not reduced as a result of any act required by said order, and (2) the County be required to develop additional standards and criteria for hiring of new personnel which will ensure that all persons employed by the Department are qualified to perform the job of fireman and have the capacity to progress through promotion given adequate training and experience in the job as fireman, and taking into account changes and developments in the nature of the duties of fire fighters as well as technological improvements. It is requested that the County be directed to permit Intervenor to participate fully in the development of such additional standards and criteria.

Intervenor further requests that any order of the Court affecting hiring include a provision that the County be required to develop affirmative action, recruitment and training programs and to expend such funds as may be reasonably necessary in the implementation thereof for the purpose of insuring that the most qualified persons will be employed by the Department. Intervenor further requests that the County be directed to develop such programs in conjunction with Intervenor and be directed to conduct such programs jointly with Intervenor. It is further requested that any such order specifically provide that County property, equipment and personnel may be utilized for the purpose of conducting such programs, and that County personnel participating therein, including employees represented by Intervenor, shall do so as a part of their official duties.

Intervenor further suggests that in the event that the Court issues any order which affects the hiring

of personnel for the Fire Department it retain jurisdiction for the purpose, among others, of reviewing at the request of any party any and all actions taken pursuant to the provisions requested by Intervenor.

Schedule Eleven (11):

INTERVENOR'S WITNESS LIST

Intervenor intends to call two witnesses whose names will be made known to the other parties before trial.

APPENDIX D.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

Van Davis, et al., Plaintiffs, vs. County of Los Angeles, et al., Defendants. Civil Action No. 73-63-WPG.

The Court, after trial, and based upon the Pre-Trial Order and all other papers filed herein, and all proceedings had herein, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Defendant County of Los Angeles, Defendant Board of Supervisors of the County of Los Angeles, and Defendant Los Angeles County Civil Service Commission ("Defendants") are governmental entities established pursuant to the Constitution and laws of the state of California. Defendant County of Los Angeles performs the function among others, of providing fire prevention and fire protection services in certain districts located within the geographical boundaries of Los Angeles County. Those services are performed through the Los Angeles County Fire Department. Intervening Defendant Los Angeles County Fire Figthers, Local 1014 ("Intervenor") represents the firemen currently employed at the Los Angeles County Fire Department. Plaintiffs are blacks and Mexican-Americans who are either incumbent firemen at the Los Angeles County Fire Department or are present applicants for employment with that department.

2. The workforce at the time the complaint herein was filed, at the Los Angeles County Fire Department,

consisted of 1,762 firemen, of whom nine (0.5%) are black and fifty (2.8%) are Mexican-American. In Los Angeles County, 10.8% of the inhabitants are black and 18.3% are Mexican-American. Defendants did not justify, at the trial or other proceedings herein, the paucity of black and Mexican-American firemen employees at the Los Angeles County Fire Department, as compared to the general population statistics for those minority groups.

3. Defendants have engaged in the following employment practices: (a) utilizing, until learning that this lawsuit was about to commence, written tests as a selection device for entry level positions at the Los Angeles County Fire Department, although such tests had a disproportionate detrimental impact upon black and Mexican-American applicants, and despite the fact that such tests have not been shown by a validation study to be related to or predictive of job performance statistically; and (b) failing and refusing to take necessary affirmative steps to overcome the existence in the black and Mexican-American communities of Los Angeles County of a reputation that the Los Angeles County Fire Department discriminates against blacks and Mexican-Americans.

4. Defendants did not interfere with affirmative action efforts of individual persons designed to increase black and Mexican-American participation rates in the workforce of the Los Angeles County Fire Department.

5. Defendants' minimum height standard of 5'7" is substantially and reasonably related to job performance as a fireman.

6. The accelerated hiring to be ordered by the Court is based on all Findings, including the following considerations:

- (a) it seems evident, as officials of Defendants testified at the trial, that Defendants will have no difficulty finding sufficient numbers of qualified Mexican-American potential firemen to fill the required ratios;
- (b) it is in the public interest to accelerate the elimination of the racial imbalance at the Los Angeles County Fire Department caused by the past discrimination of Defendants;
- (c) it appears that unless the Court orders accelerated hiring at the Los Angeles County Fire Department, there will not be sufficient hiring of blacks and Mexican-Americans as is necessary to overcome the presently existing effects of past discrimination within a reasonable period of time;
- (d) it appears that a Court order requiring accelerated hiring of minorities will aid those officials of Defendants who desire the elimination of the effects of past discrimination, in that such an order in all likelihood will make minority recruiting efforts more effective;
- (e) because the Court concludes *infra* at conclusion Number Five (5) that Defendants' requirement that all applicants be not less than 5'7" in height is valid, appropriate and legal, and because it was stipulated herein that the 5'7" minimum height requirement eliminates from consideration approximately 41% of the Mexican-American male population, it will be more difficult for Defendants to recruit sufficient numbers of Mexican-Americans on an accelerated basis is reduced.

7. Neither Defendants nor their officials engaged in employment practices with a willful or conscious purpose of excluding blacks and Mexican-Americans from employment at the Los Angeles County Fire Department. To the contrary, several of Defendants' officials engaged in efforts designed to increase the minority representation in the Los Angeles County Fire Department. Defendants did, however, intentionally engage in the employment practices outlined above in Finding of Fact Number Three (3).

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action under Title 28, U.S.C. §1343, this being a suit in equity to redress the deprivation of rights guaranteed by the laws of the United States. Those rights are guaranteed by 42 U.S.C. §§1981 and 1983 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* ("Title VII").

2. This action may be maintained by the Plaintiffs as a class action pursuant to Rule 23(a) and 23(b)(1) and (2) of the Federal Rules of Civil Procedure. The class represented is all present and future black and Mexican-American applicants and employees at the Los Angeles County Fire Department.

3. Plaintiffs' cause of action is not barred by any applicable statute of limitations. *United States v. Local 1, Ironworkers*, 438 F.2d 679, 683 (7th Cir., 1971); *United States v. Local 38, IBEW*, 428 F.2d 144 (6th Cir., 1970), *cert. denied* 400 U.S. 943 (1970).

4. In cases involving discrimination based on race and national origin, "statistics often tell much, and Courts listen." *Alabama v. United States*, 304 F.2d 583, 586 (5th Cir., 1962), *aff'd per curiam*, 371

U.S. 37 (1962). In employment discrimination cases it consistently has been held that where employment statistics, such as those before the Court, reveal a severe disproportion between the percentage of minority employees and the percentage of minorities residing within the relevant geographical area in which the employer is located, a *prima facie* case of discrimination is established. See, e.g., *United States v. Local 86, Ironworkers*, 315 F.Supp. 1202, 1236 (W.D. Wash., 1970), *aff'd* 443 F.2d 544, 551 (9th Cir., 1971) *cert. denied* 404 U.S. 984 (1971); *United States v. Hayes International Corp.*, 456 F.2d 112, 120 (5th Cir., 1972); *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, 426 (8th Cir., 1970). Defendants in this case did not rebut the *prima facie* case for Plaintiffs established by the statistics, *cited* in Findings of Fact Number Two (2).

5. Defendants' practice of disqualifying all applicants for fireman positions who fail to fulfill the personal requirement of being at least 5'7" in height is valid, appropriate and not violative of 42 U.S.C. §§1981 or 1983, or of Title VII. Defendants are not required by law to conduct a scientific or empirical study showing whether there is a relationship between that height requirement and job performance.

6. Since Defendants did intentionally engage in employment practices which had the effect of discriminating against blacks and Mexican-Americans (Finding of Fact Number Seven (7)), Plaintiffs have satisfied the showing of intent required by law. *Rowe v. General Motors*, 457 F.2d 348, 355 (5th Cir., 1972).

7. In order to eliminate the effects of past discrimination against blacks and Mexican-Americans,

those effects being the currently existing racial imbalance in the workforce of the Los Angeles County Fire Department, it is appropriate and constitutional to order the Defendants to engage in the hiring of blacks and Mexican-Americans on an accelerated basis as set forth in the Judgment herein. *United States v. Local 86, Ironworkers*, 315 F.Supp. 1202, 1248 (W.D. Wash., 1970); *aff'd* 443 F.2d 544 (9th Cir., 1971), *cert. denied* 404 U.S. 984 (1971); *United States v. IBEW, Local 212*, 472 F.2d 643 (6th Cir., 1973); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir., 1972) *cert. denied* 406 U.S. 950 (1972).

8. Plaintiffs as prevailing parties are entitled to costs and reasonable attorneys fees against Defendant County of Los Angeles.

Dated:, 1973

Consented to, as to
form only, subject to
intervenor's statement

William P. Gray
United States District Judge

A. THOMAS HUNT
CARYLE W. HALL, JR.
MARY D. NICHOLS
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APPENDIX E.

Judgment.

United States District Court, Central District of California.

Van Davis, Hershel Clady and Fred Vega, individually and on behalf of all others similar situated; Willie C. Bursey, Elijah Harris, James W. Smith, William Clady, Stephen Haynes, Jimmie Roy Tucker, Leon Aubry, Ronald Crawford, James Herald, Alfred R. Baltazar, Osbaldo A. Amparan, individually and on behalf of all others similarly situated. Plaintiffs, vs. County of Los Angeles: Board of Supervisors of the County of Los Angeles, and Civil Service Commission of the County of Los Angeles, Defendants. Civil No. 73-63-WPG.

In accordance with the Findings of Fact and Conclusions of Law filed herein, it is on this day of July, 1973,

Ordered:

1. Defendants County of Los Angeles, Board of Supervisors of the County of Los Angeles, and the Los Angeles County Civil Service Commission ("Defendants") are permanently enjoined and restrained from engaging in any employment practice which discriminates on the basis of race or national origin against the class represented by Plaintiffs in this Action, that class being all present and future black and Mexican-American firemen applicants and firemen employees at the Los Angeles County Fire Department.

2. Defendants shall in good faith make all affirmative action efforts reasonably possible and necessary to increase the black and Mexican-American participa-

tion rates in the fireman workforce at the Los Angeles County Fire Department, until such time as those participation rates are commensurate with the black and Mexican-American population percentages of Los Angeles County.

3. A minimum of twenty per cent (20%) of all new employees employed in fireman positions at the Los Angeles County Fire Department, in any one year, beginning with July 1, 1973, shall be blacks until such time as the percentage of blacks in the fireman workforce of the Los Angeles County Fire Department is equal to the percentage of blacks in the general population of Los Angeles County.

4. A minimum of twenty per cent (20%) of all new employees employed in fireman positions at the Los Angeles County Fire Department, in any one year, beginning with July 1, 1973, shall be Mexican-Americans until such time as the percentage of Mexican-Americans in the fireman workforce of the Los Angeles County Fire Department is equal to the percentage of Mexican-Americans in the general population of Los Angeles County.

5. Within thirty days of July first of every year, until such time as the black and Mexican-American participation rates at the Los Angeles County Fire Department are equal to the percentage of blacks and Mexican-Americans in the general population of Los Angeles County, Defendant County of Los Angeles shall file a report with the Court and counsel for Plaintiffs, or any person designated by such counsel; the report shall set forth the total number of new employees employed in fireman positions at the Los Angeles County Fire Department during the immediately preceding twelve month period, with a racial

breakdown showing the number of blacks and the number of Mexican-Americans among such new employees. Further, such a report shall be made within thirty days of January 1, 1974, but shall not be required thereafter except on each July first, as provided for immediately above.

6. For purposes of this Order the race and/or national origin of each applicant and new employee shall be determined by a questionnaire to be completed by each applicant, giving each applicant an opportunity to designate whether he is "black", "Mexican-American", "Spanish-surnamed" shall be considered "Mexican-Americans." If it is determined by Defendants to be convenient administratively, the described questionnaire may be included as part of Defendants' application form for fireman positions. Counsel for Plaintiffs, upon reasonable notice in writing, shall have access to all such applications and/or questionnaires.

7. Nothing in this Order shall in any way be deemed to require or encourage Defendants: (a) to employ any person not qualified for a fireman position with the Los Angeles County Fire Department; or (b) to in any way lower or refrain from increasing the standards for employment as firemen at the Los Angeles County Fire Department, provided such standards are reasonably related to the qualifications of potential firemen; all other provisions in this order are subordinate to the provisions of this paragraph numbered seven (7) and shall be subject to modification in the event of any conflict herewith.

8. Plaintiffs shall be awarded reasonable costs and attorneys' fees, to be paid by Defendant Los Angeles County. Counsel for Plaintiffs and counsel for Defendant County of Los Angeles, shall meet within ten

days of entry of this Order to attempt to agree on the amount of such costs and attorneys' fees. If the parties reach such agreement, the parties shall submit to the Court, by stipulation, a proposed Order reflecting such agreement. If the parties are unable to reach such an agreement, Plaintiffs shall be entitled to move within twenty days of the date of this Order, on the regular motion calendar, for a determination by the Court of the appropriate amount of such costs and attorneys fees.

9. Paragraphs three (3) and four (4) of this Order are subject to the provision that employees hired pursuant to a merger with or acquisition of other fire departments by Defendants, as well as employees hired into Defendants' regular training classes for new firemen, shall be considered "new employees"; this provision as to mergers and acquisitions however, does not require Defendants to hire forty percent blacks and Mexican-Americans in the year in which the merger or acquisition occurs, provided that:

- (a) at least forty percent of the new employees hired into the training class or classes, during the year the merger or acquisition occurs, are black or Mexican-American; and in addition
- (b) if the merger or acquisition involves a fire department of less than fifty fireman employees, within two years after the merger or acquisition occurs, Defendant shall have hired sufficient numbers of blacks and Mexican-Americans to meet the forty (40) percent requirements of paragraphs three (3) and four (4) of this Order; or if the merger involves a fire department of fifty to ninety-nine fireman employees, within

three years after the merger occurs, Defendants shall have hired sufficient numbers of blacks and Mexican-Americans to meet the forty (40) percent requirements of paragraph three (3) and four (4) of this Order; or if the merger or acquisition involves a fire department of from two-hundred and one to four hundred and ninety-nine fireman employees, within a proportionate number of years to those given immediately above, Defendants shall have hired sufficient numbers of blacks and Mexican-Americans to meet the forty percent requirements of paragraphs three (3) and four (4) of this Order; and

- (c) provided further that subparagraph 9 (b) immediately above shall be deemed satisfied if Defendants select the alternative procedure of hiring in the next succeeding regular training class or classes after the occurrence of any merger or acquisitions, no less than fifty (50) percent blacks and Mexican-Americans, until such time as the over-all number of black and Mexican-American new employees hired after entry of this order equals forty percent of all new employees as required by paragraphs three (3) and four (4) of this Order; and
- (d) provided further that the provisions of this paragraph number Nine (9) of this order shall not be applicable to any merger involving a fire department with more than 500 fireman employees, and if such a merger occurs any party may apply to this Court for such relief as as the law and the interests of justice may require in the situation.

10. Paragraphs three (3) and four (4) of this Order also are subject to the provision that employees of any race or national origin who fail to complete their probationary periods shall not be counted in determining whether the requirements of paragraphs three (3) and four (4) of this Order are being met, provided that if in any year a disproportionately high number of blacks and Mexican-Americans are terminated prior to completion of their probationary period, Defendants shall be required to employ in the next succeeding training class, sufficient numbers of blacks and Mexican-Americans as is required to bring the percentage of blacks and Mexican-Americans employed in the two training classes, taken together, within the requirements of paragraphs three (3) and four (4) of this Order.

11. The Court shall maintain continuing jurisdiction of this action for such alterations or amendments to this Order or other relief as may appropriate, until such time as the black and Mexican-American participation rates in the fireman workforce of the Los Angeles County Fire Department are equal to the percentage of blacks and Mexican-Americans in the general population of Los Angeles County, at which time any party may apply to the Court for dissolution of this Order, and such dissolution shall be granted provided the black and Mexican-American participation rates at the Los Angeles County Fire Department are commensurate with the percentage of blacks and Mexican-Americans in the general population of Los Angeles County.

Dated: 1973

Consented to, as to
form only, subject to
Intervenor's statement:

William P. Gray
United States District Judge

A. THOMAS HUNT
CARLYLE W. HALL, JR.
MARY D. NICHOLS
JOHN R. PHILLIPS
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APPENDIX F.

Opinion.

United States Court of Appeals, for the Ninth Circuit.

Van Davis, et al., Plaintiffs-Appellants, vs. County of Los Angeles, et al., etc., Defendants-Appellees. No. 73-3008.

Van Davis, et al., Plaintiffs-Appellees, vs. County of Los Angeles, et al., etc., Defendants-Appellants No. 73-3009.

[October 20, 1976].

Appeal from the United States District Court for the Central District of California.

Before: TUTTLE,* HUFSTEDLER and WALLACE,
Circuit Judges.

TUTTLE, Circuit Judge:

This suit was brought on behalf of all past, present and future black and Mexican-American applicants for positions as firemen with the Los Angeles County Fire Department, alleging that the defendants Los Angeles County, the Board of Supervisors of the County and the County Civil Service Commission had been guilty of past discrimination in hiring in violation of the Fourteenth Amendment, the Civil Rights Act of 1866, 42 U.S.C. §§1981, 1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*¹

The district court found that the L.A. County Fire Department employed blacks and Mexican-Americans

*Honorable Elbert P. Tuttle, Senior United States Circuit Judge, Fifth Circuit, sitting by designation.

¹Jurisdiction was based on 28 U.S.C. §1343. The additional allegations of racial discrimination in promotions were abandoned prior to trial.

grossly out of proportion to their number in the population of L.A. County. The court further found that the Fire Department, despite its admitted knowledge of its prior discriminatory practices and its bad reputation as an employer in the minority community, failed to undertake any effective positive steps to eradicate the effects of prior discrimination. Accordingly the court ordered accelerated hiring of racial minorities in a ratio of one black and one Mexican-American applicant hired for each five white applicants hired until the effects of past discrimination had been erased.²

Despite the fact that the Mexican-American population of L.A. County was approximately double the size of the black population, the district court ordered identical accelerated hiring due to its finding that the Fire Department's 5 foot, 7 inch height requirement for job applicants was a valid requirement for employment, and that this height requirement had the effect of eliminating 45% of the otherwise eligible Mexican-American applicants from consideration.

The plaintiffs appeal the trial court's finding that the 5'7" height requirement is valid and could therefore be used in limiting the relief available to the Mexican-American members of the plaintiff class. The defendants cross-appeal the trial court's order of accelerated hiring. We affirm the district court's order of accelerated hiring to cure past racial discrimination; we disagree with the court's determination that the 5'7" height requirement has been sufficiently validated by the defendants,

²Data introduced by the plaintiffs showed that this 1-1-5 ratio, given the present rate of new hiring, would produce a work force of minority firemen in proportion to the number of minority persons in the workforce by 1979 for blacks and 1983 for Mexican-Americans.

and accordingly we reverse and remand for reconsideration of the proper ratio of accelerated racial hiring to be ordered.

I. PROCEDURAL DEFENSE

Despite a minority population of approximately 29.1% in L.A. County, only 3.3% of the firemen employed by the defendants were black or Mexican-American at the time of trial. The defendants do not, and indeed cannot, dispute the trial court's finding that these data establish a prima facie case of racial discrimination. This Court has recognized that such statistics can prove past racial discrimination. *United States v. Ironworkers Local 86*, 443 F.2d 544, 550 (9th Cir. 1971) *cert. denied* 404 U.S. 984 (1971).³ Unable to contest the indisputable legal effect of these data, the defendants pose a number of procedural defenses all involving the claim that whatever discriminatory practices they might have been guilty of in the past have been ended. Specifically the defendants argue: (1) that the plaintiffs lacked standing to assert the interests of the class aggrieved by past discriminatory practices; (2) that the discriminatory practices complained of occurred prior to March 1, 1972, the date on which Title VII became applicable to cities and municipalities; and (3) that the discriminatory practices complained of occurred prior to the three year statute

³The cases holding that statistics alone may prove a prima facie case of racial discrimination in employment thereby shifting the burden to the defendants to justify the racial imbalance, are by this time legion. See, e.g., *United States v. Hayes International Corp.*, 456 F.2d 112 (5th Cir. 1972); *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *United States v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *United States v. Masonry Contractors Ass'n.*, 497 F.2d 871 (6th Cir. 1974).

of limitations on the plaintiffs §§1981 and 1983 claims.⁴

These three arguments are all based on the same undisputed fact: the last time the defendants administered a test to job applicants which had discriminatory effect was August 1969.⁵ Thus because none of the class representatives in this suit were unsuccessful applicants in 1969, and because the test was administered prior to the three-year cut off for the §§1981 and 1983 claims, and well before March 24, 1972, accordingly the defendants argue their past discriminatory actions cannot give rise to current liability. The district court found that the past discriminatory acts had continuing effect,^{6a} thereby justifying present relief. We agree.

⁴The plaintiffs do not dispute the fact that Title VII became applicable to municipalities on March 1, 1972. See 42 U.S.C. §2000e(a). Nor do they dispute the fact that their §§1981 and 1983 claims are governed by the state three year statute of limitations. See *Mills v. Small*, 446 F.2d 249 (9th Cir. 1971) *cert. denied* 30 L.Ed.2d 543 (1971). Because plaintiffs' complaint was filed on January 11, 1973, the occurrences complained of must have happened subsequent to January 11, 1970.

⁵The defendants do not dispute the fact that this verbal aptitude test had discriminatory impact, and could not be validated under the requirements of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Of the 244 blacks who took this test, 5 were hired; of the 100 Mexican-Americans, 7 were hired, while of the 1080 whites taking the test, 175 were hired. Thus while approximately 25% of the applicants were black or Mexican-American, based on the results of this test only 6.4% of the hires were minorities.

^{6a}The trial court's Finding No. 6 contains the following language: "The accelerated hiring to be ordered by the court is based on all findings, including the following considerations: . . .

(b) It is in the public interest to accelerate the elimination of the racial imbalance at the Los Angeles County Fire Department caused by the past discrimination of defendants.

(This footnote is continued on next page)

In our view the defendants claim that because the 1969 examination was *administered* in 1969 it accordingly had *effect* only in 1969 is manifestly incorrect.

The 1969 examination was administered to a large group of applicants; the successful applicants who scored well on this examination and in the subsequent interview were certified as eligible candidates, and were placed on an eligibility list for later employment as vacancies occurred in the ranks of the firemen. The parties stipulated approximately 100 such vacancies occur each year. 187 applicants were placed on the eligibility list following the 1969 examination. Based on these facts, the district court found that the examination had effect past 1969, and we think this was certainly correct. While the plaintiffs failed to show that any candidate on this list was hired after March 24, 1972, it is obvious that most were hired after January 11, 1970. Thus despite the failure of the plaintiffs to prove that specific discriminatory acts occurred during the effective period covered by Title VII, it is clear that discriminatory hiring did take

(c) It appears that unless the court orders accelerated hiring at the Los Angeles County Fire Department there will not be sufficient hiring of blacks and Mexican-Americans as is necessary to overcome the *presently existing effects of past discrimination* within a reasonable period of time."

Conclusion of Law No. 7 says:

In order to *eliminate the effects of past discrimination against blacks and Mexican-Americans, those effects being the currently existing racial imbalance in the workforce of the Los Angeles County Fire Department*, it is appropriate and constitutional to order the Defendants to engage in the hiring of blacks and Mexican-Americans on an accelerated basis as set forth in the Judgment herein. . . ." (Emphasis supplied).

place within the three years prior to their §§1981 and 1983 claims.⁶

The defendants further argue that the district court lacked jurisdiction under either §§1981 or 1983. As to §1983 the defendants are clearly correct. A municipality is not a "person" suable under §1983⁷ and thus the three municipal defendants are not subject to suit under §1983. *Monroe v. Pape*, 365 U.S. 167 (1961); *City of Kenosha v. Bruno*, 412 U.S. 507 (1973). No individual defendants were named in the suit, and thus the plaintiffs' §1983 claim is barred.⁸ §1981 is not subject to the same jurisdictional limitations; the language of the statute does not require that a defendant be a "person" before suit may be

⁶We do not consider the plaintiffs' additional arguments that such factors as the defendants' bad reputation in the minority community or nepotistic word-of-mouth recruiting and counselling may, alone, constitute sufficient discriminatory practices as to establish a valid Title VII claim. The evidence on these points was extremely impressionistic and the district court did not rely on these theories.

⁷42 U.S.C. §1983 provides:

"Every *person* who, under color of any statute . . . of any state . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceedings for redress." (emphasis added).

⁸Individuals may be sued in their official capacity. See *Harper v. Kloster*, 486 F.2d 1134, 1138 (4th Cir. 1973); *United Farmworkers of Florida Housing Project, Inc. v. City of Del Ray Beach, Florida*, 493 F.2d 799, 802 (5th Cir. 1974); *Sterzing v. Fort Bend Independent School District*, 496 F.2d 92, 93 n.2 (5th Cir. 1972). As the plaintiffs did not allege federal question jurisdiction under 28 U.S.C. §1331, their Fourteenth Amendment claim does not stand apart from their §1983 claim.

brought.⁹ Indeed, §1981 speaks only of the rights of the person denied the opportunity to make a contract due to his color—it doesn't attempt to specify who may be sued under its provisions. The construction the Supreme Court placed on the term "person" in *Monroe v. Pape* and *City of Kenosha v. Bruno* as it is used in §1983 was based entirely on the legislative history of that section, which was passed by the Congress entirely separately from §1981. In our view the statutory construction of §1983's use of a specific word does not constitute a blanket prohibition against civil rights suits against municipalities based on other code sections which don't even contain the same limiting language.¹⁰

In our view there is no operational distinction in this case between liability based on Title VII and §1981. §1981 has been construed to bar discrimination in employment by every Circuit which has considered the question. *Waters v. Wisconsin Steel Works of International Harvesters Co.*, 427 F.2d 476 (7th Cir. 1970), *cert. denied* 400 U.S. 911 (1970); *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert.*

⁹42 U.S.C. §1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every state . . . to make and enforce contracts . . . enjoyed by white citizens. . . ."

¹⁰*Arunga v. Weldon*, 469 F.2d 675 (9th Cir. 1972) might be read as applying the jurisdictional limits of §1983 to all civil rights sections. This two paragraph per curiam does not explain the reasons for such a holding, if that was in fact the basis for the holding, and we are reluctant to infer such a broad and sweeping holding from it. After circulating this opinion among all the members of this Court, this panel has been authorized to announce that to the extent this opinion is inconsistent with *Arunga*, this latter opinion is the preferred view of the majority of the members of this Court, as stated in *Sethy v. Alameda Co. Water District*, _____ F.2d _____ (9th Cir., *en banc*, 1976) [No. 73-1852 et seq. slip op'n Sept. 30, 1976.]

denied 401 U.S. 948 (1971); *Young v. International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971); *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973); *Long v. Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974).¹¹ This line of authority is so well-established the defendants do not even attempt to dispute the applicability of §1981 to employment discrimination. We join the seven other Circuits which have considered the question and hold §1981 is available as a remedy against employment discrimination based on color.

Accordingly, we believe the district court properly found the defendants guilty of employment discrimination. Despite the fact they conceded that the discriminatory effects of the verbal aptitude test they used were known even prior to the giving of the examination in 1969, the results of this examination had continued discriminatory effect as the 187 applicants hired after 1970 were employed on the basis of their success with the test. The defendants thus practiced discrimination in hiring which extended into the three year span subject to liability based on the plaintiffs' §1981 claim. As the named plaintiffs were applicants for positions during this period, the fact that they had not previously applied in 1969 is irrelevant, and accordingly they were proper class representatives.

¹¹*See generally* Comment, Racial Discrimination and Employment Under the Civil Rights Act of 1866, 36 *U.Chi.L.Rev.* 615 (1969); Herbert and Reischel, Title VII and the Multiple Approaches to Eliminating Employment Discrimination, 46 *N.Y.U.L. Rev.* 449 (1971); Peck, Remedies for Racial Discrimination in Employment, 46 *Wash. L.Rev.* 455 (1971); Larson, The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment, 7 *Harv. Rights—Civ. Lib. L. Rev.* 56 (1972).

II. THE 5 FOOT, 7 INCH HEIGHT REQUIREMENT

Among the practices of the defendants which the plaintiffs challenged was the 5'7" height requirement. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) the Supreme Court unanimously held that Title VII forbids the use of employment tests which have discriminatory effect unless the employer meets "the burden of showing that any given requirement [has] . . . a manifest relation to the employment in question." 401 U.S. at 432. This burden arises only after the challenger proves that the tests in question have the effect of selecting applicants for employment or promotion in a racial pattern significantly different from that of the pool of applicants. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Discriminatory tests are impermissible unless shown "by professionally acceptable methods," *Albermarle Paper Co. v. Moody*, 43 LW 4880, 4888 (1975) to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." 20 C.F.R. §1607.4(c), EEOC Guidelines.¹²

Here there can be no question that the 5'7" height requirement has discriminatory impact. The parties stipulated that 45% of the otherwise eligible Mexican-American applicants are excluded by the requirement.¹³

¹²These EEOC Guidelines were recently approved by the Supreme Court in *Albermarle Paper Co. v. Moody*, 43 LW 4880 (1975) as providing standards by which employment requirements may be validated.

¹³We accordingly note that the continuing use of this height requirement would constitute a continuing violation of Title VII and would provide a basis for relief under that section even were §1981 not available. We do not suggest that the

The defendants further conceded that no scientifically approved test has been utilized to determine whether the height requirement is in fact job related. The only testimony in the record on point is that of Chief Stanley E. Barlow, himself only 5'8", who testified that he believed a smaller man might have difficulty working with taller men in removing long ladders and other equipment, and might have a slower reaction time in climbing on and off equipment. Chief Barlow conceded that in the past firemen under 5'7" have been able to function without impairment due to their height.¹⁴

It seems clear to us that this testimony falls far short of validating a height requirement which had a serious impact in restricting Mexican-American employment in the County Fire Department. The district court erred in finding that the County had proven that the height requirement was job related.¹⁵

III. AFFIRMATIVE RELIEF

The defendants contest the affirmative relief ordered by the district court. As this Court has noted,

"There can be little doubt that where a violation of Title VII is found, the court is vested with

validation requirements of Title VII and §1981 are different, however. We believe Title VII validation standards may also be applied in §1981 cases.

¹⁴These shorter firemen were employed during World War II when the standard was relaxed, and when firemen of other cities automatically joined the L.A. County Fire Department when their employing cities were annexed by L.A. County.

¹⁵Similar height requirements have been recently struck down in other cases. See, *Fox v. Washington*, 43 LW 2468 (D.D.C. 4/22/75); *Hardy v. Stumpf*, 37 Cal. App. 3d 958 (1974). *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972) upheld a height requirement for firemen, but only because the plaintiffs had failed to prove discriminatory impact upon Puerto Rican applicants.

broad remedial power to remove the vestiges of past discrimination and eliminate present and assure the non-existence of future barriers to the full enjoyment of equal job opportunities by qualified black employees."

United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9th Cir. 1971) *cert. denied* 404 U.S. 984 (1971). We do not believe the court lacks equal power under §1981 to order relief.

"In fashioning an appropriate remedy for employment discrimination, Congress has granted courts plenary equitable power under both Title VII . . . and section 1981."

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 243 (5th Cir. 1974). Although the decided cases have primarily involved either Title VII or §1983, and not §1981, we do feel the vast case law under both sections approving affirmative relief is directly applicable here. No other case we have found has involved the same odd factual pattern where only §1981 is available to remedy employment discrimination, and we see no reason to limit the relief available under §1981 merely because in the past §1981 and Title VII have been read in tandem. *See, e.g., Boston Chapter, NAACP v. Beecher*, 504 F.2d 1017 (1st Cir. 1975), *cert. denied* U.S. (1975); *Pettway v. American Cast Iron Pipe Co.*, *supra*; *Franks v. Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974); *Johnson v. Goodyear Tire and Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974). Similarly we note that Title VII and §1983 cases have frequently been cited as involving analogous principles in fashioning equitable relief. *See Carter v. Gallagher*, 452 F.2d 315, 329

(8th Cir. 1971) (*en banc* reversing in part panel opinion, 452 F.2d 315) *cert. denied* 406 U.S. 950 (1972); *Rios v. Enterprise Assn. Steamfitters Local 638*, 501 F.2d 622, 628 (2d Cir. 1974), and cases involving one statute have been cited in support of the relief ordered in cases involving the other.

Eight circuits, including this one, have considered and approved the use of accelerated hiring goals or quotas to eradicate the effects of past discrimination under either Title VII or §1983. *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971) *cert. denied* 404 U.S. 984 (1971) (Title VII); *Boston Chapter, NAACP v. Beecher*, 504 F.2d 1017 (1st Cir. 1974) (§§1981, 1983 and Title VII); *Rios v. Enterprise Assn. Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974) (Title VII); *United States v. Masonry Contractors Assn.*, 497 F.2d 871 (6th Cir. 1974) (Title VII); *Franks v. Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974) (Title VII); *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir. 1974) (*en banc*) (§1983; *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973) *affirming* 361 F.Supp. 1293 (D. Mass. 1973) *cert. denied* 416 U.S. 957 (1974) (Title VII); *Vulcan Society v. Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973) (§1983); *Bridgeport Guardians, Inc. v. Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973); *United States v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973) (Title VII); *Contractors Assn. of Eastern Pennsylvania v. Sec. of Labor*, 442 F.2d 159 (3d Cir. 1971) *cert. denied* 404 U.S. 854 (1971) (Title VII); *Pennsylvania v. O'Neill*, 473 F.2d 1029 (3d Cir. 1973) (*en banc*) (§1983); *United States v. Local 212, IBEW*, 472 F.2d 634 (6th Cir.

1973) (Title VII); *United States v. Wood, Wire and Metal Lathers International Union Local 46*, 471 F.2d 408 (2d Cir. 1973) *cert. denied* 412 U.S. 939 (1973) (Title VII); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972) (§1983); *United States v. Carpenters Local 169*, 457 F.2d 210 (7th Cir. 1972) *cert. denied* 409 U.S. 851 (1972) (Title VII); *Carter v. Gallagher*, 452 F.2d 337 (8th Cir. 1971) (*en banc*) *cert. denied* 406 U.S. 950 (1972) (§1983); *United States v. IBEW Local 38*, 428 F.2d 144 (6th Cir. 1970) *cert. denied* 400 U.S. 943 (1970) (Title VII); *Local 53, Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969) (Title VII).¹⁶ While the defendants argue §703j of Title VII forbids the imposition of racial quota hiring, even were this to be an order premised on Title VII, we note this view has been uniformly rejected by the many courts which have considered the question.

We believe the district court properly exercised its discretion in ordering affirmative action to be undertaken to erase the effects of past discrimination. We do not believe that such relief may be limited to the identifiable persons denied employment in the past—for “the presence of identified persons who have been discriminated against is not a necessary prerequisite to ordering affirmative relief in order to eliminate the present effects of past discrimination.” *Carter v. Gallagher*, *supra*, 452 F.2d at 330.

“Nor are remedial goals limited to any specific or prescribed form. The precise method of remedying past misconduct is left largely to the broad

¹⁶*Harper v. Kloster*, 486 F.2d 1134 (4th Cir. 1973) did not hold to the contrary, but upheld the district court's refusal to order the imposition of quotas within the facts of that case as not being an abuse of discretion.

discretion of the district court. Goals have been expressed in terms of specific numbers or ratios . . . or percentages.”

Rios v. Enterprise Assn. Steamfitters Local 638, *supra*, 501 F.2d at 631. While we remand because the district court expressly stated that the reason it ordered identical accelerated hiring of blacks and Mexican-Americans in equal ratios was because of the validity of the 5'7" height requirement, we do not necessarily believe a 1-1-1 ratio was incorrect (indeed, it was the relief originally requested by the plaintiffs), but the court should reconsider its order in light of our decision that the 5'7" height requirement is invalid.

The defendants finally argue that the imposition of an affirmative order to hire minority applicants is unnecessary. They argue in effect that they have already commenced and that they can be relied upon further to improve their hiring practices without the added impetus of a court order. Certainly the experience in the Fifth Circuit is useful in one regard—“protestations or repentance and reform timed to anticipate or blunt the force of a lawsuit offer insufficient assurance that the practices sought to be enjoined will not be repeated.” *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972). Here the record shows that the defendant had decided to use a similar verbal aptitude test to hire new candidates in 1973, but that this decision was revoked only upon being notified that this suit was to be filed. The Personnel Director of the defendants testified at length at the trial—and he acknowledged that as early as 1969 he was aware of the discriminatory impact of the aptitude test, and that he had recommended changes in recruitment, but

that nothing was done on these recommendations. He further testified that the *only* reason the aptitude test wasn't used in 1973 was due to this suit. This record hardly supports the view that left to their own devices the defendants will devise an affirmative action program as effective as that of the district court's. We emphasized that this was not a close case, in the sense that the disproportion between minority candidates hired and the proportion of minority persons in the L.A. community was not grossly out of proportion. In a community of 28.5% minority population, only 3.5% of the candidates hired were blacks or Mexican-Americans. These data are hardly persuasive evidence of the defendants' good faith—even were such good faith relevant in fashioning relief.¹⁷

In sum, we believe the district court was wholly justified in deciding to impose affirmative hiring orders upon the defendants.

While it should be obvious to all, we nevertheless repeat the admonition that nothing said by this court is to be taken as a requirement that the defendants hire any unqualified applicant for the performance of these essential jobs.

AFFIRMED in part and **REVERSED** in part and **REMANDED** for reconsideration not inconsistent with this opinion.

¹⁷In *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971), a Title VII case, the Supreme Court rejected good faith as a defense—"Congress directed the thrust of the Act to the consequences of the employment practices, not simply the motivation." We believe good faith is equally inapplicable to §1981.

WALLACE, Circuit Judge, Dissenting:

I respectfully dissent.

Discrimination in employment based upon race, creed or color is a practice inconsistent with the views and aspirations of nearly all Americans and clearly repugnant to the principles upon which our society is built. But even in rooting out such an evil practice, we are bound by certain procedural and jurisdictional limitations which may serve to protect the rights of others.

I think it is clear from the record that the plaintiffs' challenges to two of the three alleged illegal employment practices are barred by such a jurisdictional limitation: the named plaintiffs have no standing to attack the defendants' pre-1971 hiring procedures or the height limitation. While the plaintiffs may nevertheless have standing to challenge the post-1971 procedures, I question whether the imposition of minority hiring quotas is warranted given the limited scope of this issue. Because this is a question which should be resolved in the first instance by the trial judge, however, I would reverse and remand for reconsideration of the appropriate remedy in light of the limited standing of the plaintiffs in this case.

I. Standing to Challenge the Pre-1971 Written Tests

The district court held and the majority affirms that the plaintiffs made out a *prima facie* case of employment discrimination by proving that at the time the complaint was filed in 1973, only 3.3 percent of the firemen employed by the defendants were black or Mexican-American despite the fact that those minorities accounted for approximately 29.1 percent¹ of the

¹The district court found that 10.8 percent of the population of Los Angeles County was black and 18.3 percent Mexican-American.

population of Los Angeles County. These employment statistics are necessarily the result of the defendants' pre-1971 hiring practices since no firemen were hired thereafter until the complaint was filed. As the undisputed evidence showed, however, these procedures were abandoned in 1971 in an effort to correct the fire department's racial imbalance. None of the named plaintiffs made application before October 1971. Given these facts, the standing question is simple. Even in cases of racial discrimination, a showing of injury in fact or threat of injury in fact from the allegedly illegal conduct is necessary in order to find standing. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-68 (1972). Neither named plaintiffs nor members of the plaintiff class have suffered or were threatened with any injury in fact from the pre-October 1971 hiring procedures and they therefore have no standing to litigate the legality of those procedures.

The majority attempts to surmount his standing problem by arguing that the effects of the pre-1971 procedures continued until after the plaintiffs applied for employment in October 1971. I cannot accept this argument.

The villain of the pre-1971 procedures was a discriminatory written test used as a ranking device. All hiring was done from an eligibility list which was the final product of an examination process. The process began with the written test and a physical agility test and the top scorers were then selected for oral interviews. A total score was given each applicant, with the discriminatory written test having a 35 percent weighted value. The highest ranking candidates were certified for placement on the eligibility list from which vacancies were

filled. When the list was exhausted, which usually happened in about two years, a new examination process would begin in order to produce a new eligibility list.

The last of these examination processes was initiated in 1969 by the administration of the discriminatory written test. The majority at page 4, *ante*, states that the district court found that the "1969 examination had continuing effect." The district court's Findings of Fact and Conclusions of Law do not support the majority's statement. The district court's language, fairly read, establishes what no member of the panel disputes: discrimination in 1969 and years prior thereto resulted in a "currently existing racial imbalance in the workforce of the Los Angeles County Fire Department."² That language does *not* establish that the discriminatory 1969 examination, or any prior discriminatory practice, adversely affected or "injured in fact" any of the named plaintiffs in their efforts to secure employment. Further, it is apparent from the first page of the Findings of Fact and Conclusions of Law that they were prepared by the attorneys representing the class plaintiffs. Thus, even if there were a finding as suggested by the majority, a careful examination of the record must be made to determine whether it would be supported. See *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964); *Nissho-Iwai Co. v. Star Bulk Shipping Co.*, 503 F.2d 596 (9th Cir. 1974).

The supposed continuing effect of the 1969 examination apparently stems from the belief that the pool of applicants produced by this examination somehow affected the named plaintiffs' chances of being hired.

²See footnote 5a of the majority opinion.

However, the evidence does not support such a finding, even if made. I find nothing in the record indicating how many firemen were hired in the years 1970-72. There is a stipulation that there normally are 100 firemen hired per year. There is also testimony that the 1969 examination produced a 187-applicant eligibility list. But there were no findings made on hirings.

These facts may support a finding (if made) that some firemen were hired from the 1969 test list after January 11, 1970, and obviate the statute of limitations problem. But projections from these facts do not support a finding (which was never made) that any applicants from the 1969 examination list were hired after October 1971 when the named plaintiffs applied or, more importantly, after the January 1972 test when they became eligible for oral interviews and eventual certification for appointment. Indeed, assuming 100 hirings per year, the 187-applicant 1969 list would have been exhausted some time in early 1971.

The only other evidence in the record, through meager, supports this view of the facts. First, Mr. Nesvig, the Los Angeles County Personnel Director, was asked why in December 1972 they decided to interview only the top 544 scorers on the 1972 test even though they knew that would have a disproportionate detrimental effect on minorities. His response was: "We were desperate, in my opinion. . . . We had gone for almost two years [*i.e.*, since early 1971] with many vacancies" Later, Mr. Barlow, Chief Deputy Engineer and the number two man in the Los Angeles County Fire Department, was asked why they had not had any affirmative action since 1971. His response: "We did not have a list to hire off of, and our first class off of this [the current] list,

which examination [meaning the entire process from initial application to eligibility list] started in 1971, . . . was not started until April 9 [1973]."

Thus I think it clear that the pre-1971 procedures had no impact on the named plaintiffs in this case. They therefore have no standing to challenge those procedures and the district court did not have jurisdiction to consider the results of those examinations.

II. The Challenge to the Post-1971 Procedures

As noted above, prior to accepting applications for a new examination procedure in 1971, the entire procedure was changed. Since the named plaintiffs' applications were processed under these new procedures, they clearly have standing to litigate the legality of these procedures. Given the limited scope of the claim, however, I question the appropriateness of the sweeping injunctive relief granted.

The new procedures were to be as follows. Written tests were to be eliminated as a ranking device, but because of the large number of applicants (3500) and the relatively few job openings (33), some method had to be adopted to limit the number of applicants interviewed. Thus a new written test was designed in an attempt to eliminate cultural bias. The test was to be given and graded on a pass-fail basis for the sole purpose of screening out illiterates. Five hundred of the passing applicants were to be selected at random for oral interviews. This method eliminated the written test as a ranking device and gave every passing applicant an equal opportunity to be chosen for an oral interview. Ninety-seven percent of the applicants passed the written test; 1,885 were white, 170 black and 283 Mexican-American. The passing applicants were

to be ranked solely on the basis of the results of the physical agility test and the oral interviews.

After administration of the written test, but before the random selection could be made, a lawsuit was filed in state court against the county, charging that the random selection process violated provisions of the county charter and civil service regulations requiring that selection for oral interviews be made on merit. The county was enjoined from using this method pending trial on the merits. As a result, the examination process was halted for over two years and no interviews or physical tests were given and no eligibility list was certified.

As vacancies increased, the county fire department urged that the applicants, who by this time had been waiting for almost 18 months, be interviewed and an eligibility list certified. In desperation, the county Department of Personnel proposed to interview those applicants who had received the top 544 scores on the 1972 written test. Of this number, 492 were white, 10 black and 33 Mexican-American. The applicants were not to be ranked on the basis of the test results, however, and the interviews were not intended to eliminate the remaining applicants from consideration. The purpose was solely to expedite the hiring of sufficient firemen to meet the immediate, urgent requirements of the fire department.

The plaintiffs herein objected to this proposal. Upon learning of the complaint about to be filed in this action, the Director of Personnel abandoned the plan and implemented a new procedure whereby all of the passing applicants would be interviewed. The interviews commenced on January 20, 1973.

The plaintiffs filed this civil rights action naming as defendants the County of Los Angeles, the Board of Supervisors of the county and the Civil Service Commission. The complaint alleged racial discrimination in violation of 42 U.S.C. §§ 1981 and 1983. The defendants completed interviewing all of the applicants by the end of March 1973 and certified an eligibility list. Of the top 315 applicants on this list, 210 were white, 39 black, 59 Mexican-American and 7 of other races (a total of 33.5 percent minorities). It was conceded by the plaintiffs that this examination and ranking procedure did not have a discriminatory impact on blacks and Mexican-Americans.

At the conclusion of the trial, the district court specifically found that the defendants had not interfered with affirmative action efforts designed to increase black and Mexican-American participation rates and that, to the contrary, several officials had engaged in efforts designed to increase minority representation in the fire department. The court further found that neither the defendants nor their officials had engaged in employment practices with a willful or conscious purpose of excluding blacks and Mexican-Americans from employment.

The court concluded, however, that the defendants had failed to take the necessary affirmative action to overcome the existence in the minority community of a discriminatory reputation and had engaged in the discriminatory employment practice of utilizing as a selection device non-validated written tests that had a disproportionate detrimental impact on blacks and Mexican-Americans. I agree with the majority that the subjective discriminatory reputation of the fire de-

partment cannot be the basis of a valid section 1981 claim.

The challenge to the use of the 1972 written test as a selection device is appropriate under section 1981. The claim is not mooted by the decision, prompted by the filing of this lawsuit, not to use the written test as a selection device but instead to interview all the applicants. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). There is nothing per se wrong with written employment tests; violation of section 1981 occurs only when the test is found to have a disproportionate detrimental impact on a minority group and has not been sufficiently validated as reasonably related to job performance. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Here, the district court found that the 1972 test violated the *Griggs* standard and I cannot conclude that the finding was clearly erroneous.

Even if the plaintiffs have established a section 1981 violation with respect to the defendants' use of the 1972 written test results, however, that violation does not necessarily justify the imposition of minority hiring quotas on the defendants. The use of quotas must be carefully weighed. As the Supreme Court stated in *Griggs*:

Congress did not intend by Title VII [and inferentially by section 1981], however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority,

is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Id. at 430-31.

In this case the trial judge ordered that 20 percent of all newly-hired firemen be black and that 20 percent be Mexican-American, compared to the respective proportions of those minorities in the population of 10.8 percent and 18.3 percent. Imposition of this hiring quota may well result in discrimination against equally or better qualified applicants solely on account of their race. Here, for example, a native American Indian, Asian-American, Hungarian-American or Polish-American may not be hired in order to provide a job for a black or Mexican-American. While quotas are sometimes necessary to correct past discrimination against certain groups, the possible prejudicial effects on others must be weighed closely by the district court.³

³See *McDonald v. Santa Fe Trail Transp. Co.*, U.S. (June 25, 1976) (section 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*, prohibit racial discrimination in private employment against white persons upon the same standards as racial discrimination against nonwhites). Cf. *Franks v. Bowman Transp. Co.*, U.S., (March 24, 1976) (Burger, C.J., concurring and dissenting) (white employees injured by award of retroactive seniority to nonwhites may petition for equitable relief on their own behalf).

I agree, of course, that equitable relief to rectify past discrimination will often impose burdens on those innocent of any discriminatory activity. *Franks v. Bowman Transp. Co.*, *supra*, U.S. at (slip op. at 24-30). But the equitable relief should be tailored only to ameliorating the effects of past unlawful discrimination. See *id.*; note 4 *infra*.

Thus, in a recent case very similar to this one, the Second Circuit reversed the district court's imposition of quotas as unwarranted. *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420 (2d Cir. 1975). The case involved a challenge to the use of a discriminatory written test as a basis for promotion under a civil service system. The plaintiffs challenged the disproportionate impact only of the most recent test and made no claim of bad faith or intentional discrimination. The district court ordered the defendants to develop a validated non-discriminatory promotion procedure and imposed promotion quotas to cure the effects of past discrimination. The Second Circuit upheld the order to develop a non-discriminatory procedure, but with respect to the imposition of quotas, held that "[i]n view of the limited scope of the issues framed in this class action . . . the imposition of permanent quotas to eradicate the effects of past discriminatory practices is unwarranted." *Id.* at 428 (footnote omitted).⁴

Here, the district judge obviously imposed the quotas to overcome the effects of the pre-1971 procedures because at the time the suit was commenced, there had been no hiring based upon the 1972 written test. Since the plaintiffs had no standing to challenge these

⁴The court also noted that the quotas would unnecessarily nullify the state constitutional provisions requiring that promotions be made from the top three officers on the eligibility list, a decision which should be left to "the people speaking through their legislators." *Id.* at 429.

See also *Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976) (racial quotas in public employment layoffs not designed to remedy past discrimination are not authorized under section 1981 or Title VII); accord, *Weber v. Kaiser Alum. & Chem. Corp.*, F.Supp. (E.D. La. 1976), 45 U.S.L.W. 2018 (Title VII in private employment context).

pre-1971 procedures, I would reverse and remand the case to the district court for reconsideration of the appropriateness of quotas in this case. It is clear to me that the court can fashion an order prohibiting any discriminatory use of the 1972 test results directly without imposing quotas.

III. The Height Limitation

The only issue remaining is that pertaining to the height limitation. It comes to us by a curious route. The plaintiffs phrase their request for relief as follows:

The only modification of the Judgment sought on this appeal is an increase in the Mexican-American hiring ratio, such increase to be ordered if there is a reversal by this Court of Appeal of the District Court's conclusion of law that the height standard is job-related and legal. Plaintiffs-appellants did not seek below and do not seek on this appeal, an order enjoining the use of the 5'7" height standard.

If the plaintiffs have never put the legality of the height limitation in issue, I do not see how the district judge abused his discretion in taking the height limitation into account in fashioning the remedy.

But even if the issue is before us, there is once more a complete absence of parties having standing to pursue it. None of the named plaintiffs are alleged to be under 5'7". To the contrary, it has been stipulated that all named plaintiffs are present employees or presently on an eligibility list. Since one of the requirements is a minimum height of 5'7", each of them must be at least that tall. Consequently, none of them have suffered an injury in fact from the alleged discriminatory practice.

Although the class was certified as "all present and future . . . Mexican-American applicants," some of whom may be less than 5'7" tall, the named plaintiffs cannot represent them because their interests are antagonistic. Fed. R. Civ. P 23(a)(3), (4). Applicants 5'7" and taller have an interest in limiting the number of their competitors by retaining the height requirement. This may be the reason why the plaintiffs did not ask that the height limitation be enjoined but merely now seek a larger hiring quota for Mexican-Americans in spite of it.

I would therefore reverse and remand.

APPENDIX G.

Van Davis et al., Plaintiffs-Appellants, v. County of Los Angeles et al., etc., Defendants-Appellees.

Van Davis et al., Plaintiffs-Appellees, v. County of Los Angeles et al., etc., Defendants-Appellants.

Nos. 73-3008 and 73-3009.

United States Court of Appeals, Ninth Circuit.

Dec. 14, 1977.

Rehearing Denied Jan. 30, 1978.

Affirmed in part, reversed in part and remanded.

Wallace, Circuit Judge, dissented with an opinion.

Before TUTTLE,* HUFSTEDLER and WALLACE, Circuit Judges.

TUTTLE, Circuit Judge:

This Court entered its original opinion in this case on October 20, 1976. The Court thereafter granted defendants-cross-appellants' motion for rehearing, and the case was regularly set down for rehearing and oral argument. Although the principal basis for the rehearing motion was the Supreme Court's decision in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), the parties were permitted to brief and argue all other issues as well.

We now withdraw the original opinion and decision, and this opinion and decision are announced in their stead.

This suit was brought on behalf of all present and future black and Mexican-American applicants for posi-

*Honorable Elbert P. Tuttle, Senior United States Circuit Judge, Fifth Circuit, sitting by designation.

tions as firemen with the Los Angeles County Fire Department,¹ alleging that the defendants Los Angeles County, the County Board of Supervisors and the County Civil Service Commission had been guilty of racial discrimination in hiring in violation of the Fourteenth Amendment, 42 U.S.C. §§ 1981, 1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*²

The district court found that the Los Angeles County Fire Department employed blacks and Mexican-Americans grossly out of proportion to their number in the population of Los Angeles County. The court further found that the Fire Department, despite its admitted knowledge of its prior discriminatory practices and its bad reputation as an employer in the minority community, failed to undertake any effective positive steps to eradicate the effects of prior discrimination. Accordingly, the court ordered accelerated hiring of racial minorities in a ratio of one black and one Mexican-American applicant for each three white applicants until the effects of past discrimination had been erased.³

Despite the fact that the Mexican-American population of Los Angeles County was approximately double the size of the black population, the district court

¹The plaintiff class also included all present and future black and Mexican-American employees of the Fire Department, who alleged racial discrimination in connection with defendants' promotion practices. These additional allegations, however, were abandoned prior to trial.

²Jurisdiction was based on 28 U.S.C. § 1343.

³Data introduced by the plaintiffs showed that this 1-1-3 ratio, given the present rate of hiring would produce a work force of minority firemen in proportion to the number of minority persons in the community by 1979 for blacks and 1983 for Mexican-Americans.

ordered identical accelerated hiring for both groups due to its finding that the Fire Department's 5'7" height requirement for job applicants was a valid requirement for employment and that this height requirement had the effect of eliminating 41% of the otherwise eligible Mexican-American applicants from consideration.

The plaintiffs appeal the trial court's finding that the 5'7" height requirement is valid and could therefore be used in limiting the relief available to the Mexican-American members of the plaintiff class. The defendants cross-appeal the trial court's order of accelerated hiring. We affirm the district court's finding of a current violation of the rights of members of this class by the improper post-1971 use of an unvalidated written test as a selection device for entry level positions and its order of accelerated hiring to cure past racial discrimination; we disagree with the court's findings that plaintiffs have standing to challenge defendants' pre-1971 use of an unvalidated written test as a selection device and that the 5'7" height requirement has been sufficiently validated by the defendants. Accordingly, we reverse and remand for reconsideration of the proper ratio of accelerated racial hiring to be ordered.

I. *Written Examination Procedures*

Despite a minority population of approximately 29.1% in Los Angeles County, only 3.3% of the firemen employed by the defendants at the time of trial were black or Mexican-American. Plaintiffs alleged, and the trial court found, that this severe racial imbalance resulted in part from the defendants' utilization of unvalidated written examinations to rank applicants for positions as firemen. The defendants do not,

and indeed cannot, dispute that these verbal aptitude tests, administered to applicants in August 1969 and in January 1972, had a discriminatory impact on minority applicants. Of the 244 blacks who took the 1969 examination, 5 were hired; of the 100 Mexican-Americans, 7 were hired, while of the 1080 whites taking the test, 175 were hired. Thus, while approximately 25% of the 1969 applicants were black or Mexican-American, based on the results of this test only 6.4% of the hires were minorities. Black and Mexican-American applicants fared no better on the 1972 examination. Specifically, while 25.8% of the white applicants were among the top 544 scorers on the test, only 5.1% of the black applicants were included in that group. Applying the now-familiar standards announced in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), the district court concluded that such statistical data alone established a prima facie case of racial discrimination in employment, thereby shifting the burden to the defendants to establish that the tests were job-related.⁴ We agree that defendants failed to satisfy their burden.⁵

⁴The cases holding that statistics alone may prove a prima facie case of employment discrimination, thereby shifting the burden to the defendants to justify the racial imbalance, are by this time legion. See, e.g., *United States v. Masonry Contractors Ass'n of Memphis, Inc.*, 497 F.2d 871, 875 (6th Cir. 1974); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 225 (5th Cir. 1974); *United States v. N. L. Indus., Inc.*, 479 F.2d 354, 368 (8th Cir. 1973); *United States v. Hayes Int'l Corp.*, 456 F.2d 112, 120 (5th Cir. 1972); *United States v. Ironworkers Local 86*, 443 F.2d 544, 550-51 (9th Cir.), cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971).

⁵Defendants conceded that no studies establishing the validity of the written employment tests have been conducted in accordance with "professionally acceptable methods." See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

Defendants have challenged the plaintiffs' standing to complain of the use of the unvalidated 1969 written test. In light of the fact that plaintiffs' class did not include any prior unsuccessful applicants, it follows that plaintiffs neither suffered nor were threatened with any injury in fact from the use of the 1969 examination. No firemen were hired on the basis of success on this test after plaintiffs became applicants in October 1971. The parties stipulated that approximately 100 vacancies occur in the ranks of firemen each year, and testimony at trial established that 187 applicants were placed on an eligibility list following the 1969 test. Based on these facts, we must conclude that the 1969 list was depleted before plaintiffs applied for employment as firemen.

In the absence of a statute expressly conferring standing, it is well settled that in order to have standing a plaintiff must suffer some actual or threatened injury as a result of the alleged unlawful conduct. See, e.g., *Linda S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-67, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972); *Flast v. Cohen*, 392 U.S. 83, 101, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); *Baker v. Carr*, 369 U.S. 186, 204-208, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). It is thus clear that plaintiffs lacked standing to challenge defendants' prior use of the test in 1969.⁶

⁶Our holding on this point makes it unnecessary to discuss defendants' contention that the recent decision in *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977), precludes plaintiffs from attacking the defendants' pre-1971 hiring procedures.

It is equally clear that defendants' decision to employ the 1972 written test as a selection device was an unlawful employment practice which had adverse impact on the racial class of plaintiffs. The plaintiffs thus have standing to litigate the lawfulness of the 1972 test.

As previously indicated, the district court reached the conclusion that defendants' use of unvalidated written examinations was an illegal employment practice through application of the principles announced in *Griggs*, a Title VII case. Subsequent to trial on the merits in this case, the Supreme Court in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), held that to establish a prima facie case of *unconstitutional* employment discrimination, discriminatory intent or purpose must be shown rather than or in addition to a statistical showing of disproportionate impact. Defendants interpret *Washington* to require similar proof in cases alleging employment discrimination under § 1981. Accordingly, defendants urge us to reverse the decision of the district court, since no showing was made that defendants administered the 1972 examination with any intent or purpose to discriminate against minority applicants. The issue presented is one of first impression in this Circuit.⁷ We have

⁷Only four other Courts of Appeals have had occasion to apply or construe the decision in *Washington*. The Court of Appeals for the D.C. Circuit has stated that a plaintiff proceeding under Title VII and § 1981 need not show the type of purposeful or intentional discrimination required to establish a violation of the Equal Protection Clause. *Kinsey v. First Regional Securities Inc.*, 557 F.2d 830 (D.C. Cir. 1977) (dictum).

In *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977), the court reversed the trial court's finding that the defendants' written examination violated the Fourteenth Amendment solely because the plaintiffs failed to satisfy the purposeful discrimination requirement of *Washington*. *Id.* at 485. The *City of Chicago* plaintiffs also had alleged that the examination violated § 1981, and defendants here contend that the appeals court equated § 1981 with the Fourteenth Amendment for purposes of determining the burden of proof applicable to non-Title VII actions. The *City of Chicago* court, however, made no mention of § 1981 in reversing the district court's ruling but specifically held that the defendants' hiring and promotion policies "did not violate the *Constitution*." *Id.* (emphasis added).

(This footnote is continued on next page)

carefully reviewed the Court's opinion in *Washington* and the post-*Washington* cases brought to our attention by the parties. We must reject defendants' argument.

The primary controversy in *Washington* involved the validity of a qualifying test—"Test 21"—administered to persons seeking employment with the D.C. Metropolitan Police Department. The plaintiffs alleged that Test 21 excluded a disproportionately high number of black applicants in violation of their rights under the Due Process Clause of the Fifth Amendment, 42 U.S.C. § 1981 and § 1-320 of the D.C. Code. 426 U.S. at 233, 96 S.Ct. 2040. Following various preliminary proceedings before the trial court, plaintiffs moved for partial summary judgment on their constitutional claim

In *Chicano Police Officer's Ass'n. v. Stover*, 526 F.2d 431 (10th Cir. 1975), an employment discrimination action alleging violations of the Equal Protection Clause, §§ 1981, 1983 and 1985, the court held that "the measure of a claim under the Civil Rights Act is in essence that applied in a suit under Title VII. . . ." *Id.* at 438. (citations omitted). Subsequently, the Supreme Court granted certiorari, vacated the judgment and remanded for reconsideration in light of *Washington v. Davis*. *Stover v. Chicano Police Officer's Ass'n*, 426 U.S. 944, 96 S.Ct. 3161, 49 L.Ed.2d 1181 (1976). Defendants here argue that had the Supreme Court intended the adverse impact rule of Title VII to apply to § 1981 actions after *Washington*, the Court simply would have denied certiorari in *Stover* and allowed the judgment to stand on the basis of a violation of § 1981 alone. However, neither the district court nor the court of appeals in *Stover* ever found that defendants had violated § 1981. Further, it is clear that the Supreme Court's action was necessitated by the court of appeal's failure to distinguish causes of action under §§ 1981 and 1983 in equating the "Civil Rights Act" and Title VII. And although the case was eventually remanded to the district court, *Chicano Police Officer's Ass'n v. Stover*, 552 F.2d 918 (10th Cir. 1977), the issue before this Court was not expressly decided.

Finally, in *Arnold v. Ballard*, 12 E.P.D. ¶ 11,224 (6th Cir. 1976) (per curiam), the court vacated an earlier decision and remanded for reconsideration in light of *Washington*. The per curiam opinion, however, did not discuss the issue now before us and did not explain the rationale underlying the court's decision.

alone. Defendants also moved for summary judgment, asserting that plaintiffs were entitled to relief on neither constitutional nor statutory grounds. The district court, after finding that plaintiffs' statistical showing of disproportionate impact established a prima facie case of discrimination, concluded that Test 21 was "reasonably and directly related to the requirements of the police recruit training program." *Davis v. Washington*, 348 F.Supp. 15, 17 (D.D.C. 1972). Accordingly, the court granted defendants' and denied plaintiffs' motions. *Id.* at 18.

On appeal, plaintiffs argued that their summary judgment motion, which rested on purely constitutional grounds, should have been granted. The Court of Appeals for the D.C. Circuit agreed and reversed. *Davis v. Washington*, 168 U.S.App.D.C. 42, 512 F.2d 956 (1975). Announcing that it would be guided in its decision by the Title VII standards formulated in *Griggs*, the appeals court agreed that plaintiffs' statistical showing alone, without proof of a purpose on the employer's part to discriminate, made out a prima facie case, shifting the burden of proof to the defendants. 168 U.S.App.D.C. at 47, 512 F.2d at 961. In light of the district court's finding of a nexus between Test 21 and future success in police training school, the court then identified the "ultimate issue" to be "whether that kind of proof [was] an acceptable substitute" for the job-relatedness showing required by *Griggs*. *Id.*, 168 U.S. App.D.C. at 48-49, 512 F.2d at 962-63. Concluding that it was not, the court directed that plaintiffs' motion for partial summary judgment be granted and the defendants' motions denied.

The Supreme Court reversed, concluding that plaintiffs "were entitled to relief on neither constitutional

nor statutory grounds." *Washington v. Davis*, 426 U.S. 229, 248, 96 S.Ct. 2040, 2052, 48 L.Ed.2d 597 (1976). Mr. Justice White prefaced Part II of the majority opinion with this statement: "Because the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it, we reverse" *Id.* at 238, 96 S.Ct. at 2046 (emphasis added). In holding that proof of racially discriminatory intent or purpose is required to show an equal protection violation, the Court disavowed ever having ruled that "a law or other official act . . . is unconstitutional solely because it has a racially disproportionate impact." *Id.* at 239, 96 S.Ct. at 2047. It is significant that throughout this discussion of "constitutional standards" and "Constitution-based claims,"⁸ the Court mentioned neither § 1981 nor cases construing that statute.⁹ Nor can

⁸The language used by the Court clearly indicates that Part II of the opinion was directed solely toward claims of unconstitutional employment discrimination. The following passages are illustrative: (1) "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical" to the Title VII standards. 426 U.S. at 239, 96 S.Ct. at 2047 (emphasis added); (2) "This is not to say . . . that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination." *Id.* at 241, 96 S.Ct. at 2048 (emphasis added); (3) "Disproportionate impact . . . is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." *Id.* at 242, 96 S.Ct. at 2049 (emphasis added); (4) "We are not disposed to adopt [the] more rigorous [Title VII] standard for the purposes of applying the Fifth and the Fourteenth Amendments. . . ." *Id.* at 247-48, 96 S.Ct. at 2051 (emphasis added).

⁹Defendants contend that the *Washington* majority "Specifically refer[red] to several § 1981 cases and note[d] their disagreement with the appellate court's reliance upon the Title VII standards of proof." The Court did note its disapproval of several cases but explained that it was in disagreement (This footnote is continued on next page)

it be said that in resolving the equal protection question before it, the Court necessarily resolved the § 1981 claim on the same basis.

During recent history, every court which has considered the question has construed § 1981 to bar discrimination in employment. *See Long v. Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974); *Macklin v. Spector Freight Sys., Inc.*, 156 U.S.App.D.C. 69, 478 F.2d 979 (1973); *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Brown v. Gaston County Dyeing Mach. Co.*, 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982, 93 S.Ct. 319, 34 L.Ed.2d 246 (1972); *Young v. International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971); *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948, 91 S.Ct. 935, 28 L.Ed.2d 231 (1971); *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970). The courts consistently have employed Title VII principles as a benchmark not only in cases involving alleged discriminatory impact. *see Wade v. Mississippi Coop. Extension Serv.*, 528 F.2d 508, 516-17 (5th Cir. 1976); *King v. Yellow Freight Sys., Inc.*, 523 F.2d 879, 882 (8th Cir. 1975); *Kirkland v. New York State Dept. of Correctional Servs.*, 520 F.2d 420, 425 (2d Cir. 1975), *cert. denied*, 429 U.S. 823, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976); *Barnett v. W. T. Grant Co.*, 518 F.2d 543, 549 (4th Cir. 1975), but in other

only "to the extent that those cases rested on or expressed the views that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation." 426 U.S. at 245, 96 S.Ct. at 2050 (emphasis added). Furthermore, each case cited in this context involved, in addition to a § 1981 claim, a claim under either the Equal Protection Clause or § 1983.

contexts as well. *See, e.g., Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1281 & n. 3 (7th Cir. 1977) (discriminatory discharge of employee); *McCormick v. Attala County Bd. of Educ.*, 541 F.2d 1094, 1095 (5th Cir. 1976) (per curiam) (available remedies). Indeed, the Supreme Court has recognized that Title VII and § 1981 embrace "parallel or overlapping remedies against discrimination." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 & n. 7, 94 S.Ct. 1011, 1019, 39 L.Ed.2d 147 (1973). In the absence of any express pronouncement from the Supreme Court—a pronouncement not delivered in *Washington*—we are unwilling to deviate from this established practice. Any unnecessary deviation not only could produce undesirable substantive law conflicts, *see Waters v. Wisconsin Steel Works of Int. Harvester Co.*, 502 F.2d 1309, 1316 (7th Cir. 1974), *cert. denied*, 425 U.S. 997, 96 S.Ct. 2214, 48 L.Ed.2d 823 (1976), but also would dilute what has been a potent remedy for the ills of countless minority employees subjected to the unlawful discriminatory conduct of their employers. Thus, we cannot conclude that *Washington* embraced a ruling that a showing of disproportionate impact no longer will suffice to establish a prima facie case of employment discrimination under § 1981.¹⁰ In our view, there remains no operational distinction in this context between liability based upon Title VII and § 1981.

The defendants further argue that the district court lacked jurisdiction under either §§ 1981 or 1983 to

¹⁰ *Accord, League of Latin American Citizens v. City of Santa Ana*, 410 F.Supp. 873 (C.D.Cal. 1976). *But see Ortiz v. Bach*, 14 F.E.P. Cases 1019 (D.Colo. 1977). *Johnson v. Hoffman*, 424 F.Supp. 490 (E.D.Mo. 1977); *Resident Advisory Bd. v. Rizzo*, 425 F.Supp. 987 (E.D.Pa. 1976).

decide these claims. As to § 1983, the defendants are clearly correct. A municipality is not a "person" suable under § 1983,¹¹ and thus the three municipal defendants are not subject to suit under § 1983. See *City of Kenosha v. Bruno*, 412 U.S. 507, 511-13, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973); *Monroe v. Pape*, 365 U.S. 167, 187-92, 81 S.Ct. 473, 5 L.Ed. 2d 492 (1961). Since no individual defendants were named in this suit, the plaintiffs' § 1983 claim is barred.¹² Section 1981, however, is not subject to the same jurisdictional limitations. See *Sethy v. Alameda County Water Dist.*, 545 F.2d 1157 (9th Cir. 1976) (en banc).

In summary, we believe the district court properly found defendants' use of the 1972 written examination as a selection device to be a violation of § 1981. Plaintiffs produced overwhelming statistical data to establish the test's disproportionate impact upon minority applicants, and the defendants were unable to validate

¹¹42 U.S.C. § 1983 provides:

"Every person who, under color of any statute . . . of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." (emphasis added).

¹²Individuals may be sued in their official capacity. See *Sterzing v. Fort Bend Independent School Dist.*, 496 F.2d 92, 93 n. 2 (5th Cir. 1972); *United Farmworkers of Florida Housing Project, Inc. v. City of Del Ray Beach*, 493 F.2d 799, 802 (5th Cir. 1974); *Harper v. Kloster*, 486 F.2d 1134, 1138 (4th Cir. 1973). As the plaintiffs did not allege federal question jurisdiction under 28 U.S.C. § 1331, their Fourteenth Amendment claim does not stand apart from their § 1983 claim. Although it should be clear, we also note that since no purposeful or intentional discrimination by the defendant was proved, plaintiffs' Fourteenth Amendment and § 1983 causes of action could not have been sustained under *Washington*.

the test in terms of job-relatedness.¹³ Defendants' decision, prompted solely by the filing of this lawsuit, to abandon the written exam as a selection device does not moot the claim. *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-33, 73 S.Ct. 894, 97 L.Ed. 1303 (1953).¹⁴

II. The 5 Foot, 7 Inch Height Requirement

Among the other of defendants' practices challenged by the plaintiffs was the 5'7" height requirement. In *Dothard v. Rawlinson*, U.S., 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977), the Supreme Court held that Title VII forbids the use of height requirements which have discriminatory effect unless the employer meets "the burden of showing that [the] requirement [has] . . . a manifest relation to the employment in question." *Id.* at 2726, quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

Here, there can be no question that the 5'7" height requirement has discriminatory impact. The parties stipulated that 41% of the otherwise eligible Mexican-

¹³In Part III of the opinion in *Washington v. Davis*, the majority agreed with the district court's conclusion that Test 21 had been sufficiently validated by a validation study and other evidence showing a nexus between success on the test and success in police training school. 426 U.S. at 250-51 & n. 17, 96 S.Ct. 2040. It is at least arguable that by not requiring the defendants to meet the job-relatedness standards of Title VII, the Court implicitly held that employers sued under § 1981 may escape liability by showing something less than job-relatedness. We need not address that question here, since defendants' proof not only is insufficient under *Griggs*, but also falls far short of the quality and quantity of proof offered in *Washington*.

¹⁴Of course, this continued threat to use the 1972 test as part of the selection process right up to the filing of the complaint in this case as admittedly a violation of Title VII.

American applicants are excluded by the requirement.¹⁵ The defendants further conceded that no scientifically approved test has been utilized to determine whether the height requirement is in fact job-related. The only testimony in the record on point is that of Chief Stanley E. Barlow, himself only 5'8", who testified that he believed a small man might have difficulty working with taller men in removing long ladders and other equipment and might have a slower reaction time in climbing on and off equipment. Chief Barlow conceded that in the past firemen under 5'7" have been able to function without impairment due to their height.¹⁶

It seems clear to us that this testimony falls far short of validating a height requirement which has a serious impact in restricting Mexican-American employment in the County Fire Department.¹⁷ The district court did not have the benefit of *Dothard*, *supra*, and, therefore, did not apply the standard of proof required by that case. The evidence introduced was inadequate to meet the *Dothard* requirement that the height restriction was manifestly related to employment by the Fire Department. Accordingly, the district court's finding of job-relatedness must be reversed.

III. Affirmative Relief

The defendants contest the affirmative relief ordered by the district court. However, as this Court has noted,

¹⁵We accordingly note that the continuing use of this height requirement constitutes a continuing violation of Title VII and provides a basis for relief in addition to § 1981.

¹⁶These shorter firemen were employed during World War II when the standard was relaxed, and when firemen of other cities automatically joined the L.A. County Fire Department when their employing cities were annexed by L.A. County.

¹⁷Our earlier comments with respect to validation of employment criterion challenged under § 1981 are equally applicable in this context. See note 15, *supra*.

"[t]here can be little doubt that where a violation of Title VII is found, the court is vested with broad remedial power to remove the vestiges of past discrimination and eliminate present and assure the non-existence of future barriers to the full enjoyment of equal job opportunities by qualified black workers."

United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9th Cir.), *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971) (citations omitted). We do not believe the court lacks equal power under § 1981 to order relief. Indeed, "[i]n fashioning an appropriate remedy for employment discrimination, Congress has granted courts plenary equitable power under both Title VII . . . and section 1981." *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 243 (5th Cir. 1974) (footnotes omitted). Although the decided cases have primarily involved either Title VII or § 1983, and not § 1981, we feel the extensive case law under both sections approving affirmative relief is directly applicable here. We see no reason to limit the relief available under § 1981 merely because in the past § 1981 and Title VII have been read in tandem. See, e.g., *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975); *Franks v. Bowman Transp. Co.*, 495 F.2d 398 (5th Cir. 1974) *modified*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974). Similarly, we note that Title VII and § 1983 cases frequently have been

cited as involving analogous principles in fashioning equitable relief, see *Rios v. Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622, 628 (2d Cir. 1974); *Carter v. Gallagher*, 452 F.2d 315, 329 (8th Cir. 1971) (en banc), cert. denied, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972), and cases involving one statute have been cited in support of the relief ordered in cases involving the other.

Eight Courts of Appeals, including this one, have considered and approved the use of accelerated hiring goals or quotas to eradicate the effects of past discrimination. See *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975) (§§ 1981 & 1983, Title VII); *Rios v. Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974) (Title VII); *United States v. Masonry Contractors Ass'n of Memphis, Inc.*, 497 F.2d 871 (6th Cir. 1974) (Title VII); *Franks v. Bowman Transp. Co.*, 495 F.2d 398 (5th Cir. 1974), modified, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (Title VII); *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir.) (en banc), cert. denied, 419 U.S. 895, 95 S.Ct. 173, 42 L.Ed.2d 139 (1974) (§ 1983); *Vulcan Society v. Civil Serv. Comm'n*, 490 F.2d 387 (2d Cir. 1973) (§ 1983); *Associated Gen. Contractors of Mass., Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974) (Title VII); *Bridgeport Guardians, Inc. v. Civil Serv. Comm'n*, 482 F.2d 1333 (2d Cir. 1973) (§§ 1981, 1983); *United States v. N.L. Indus., Inc.*, 479 F.2d 354 (8th Cir. 1973) (en banc) (§ 1983); *Pennsylvania v. O'Neill*, 473 F.2d 1029 (3d Cir. 1973) (en banc) (§ 1983); *United States v. Local 212, IBEW*, 472 F.

2d 634 (6th Cir. 1973) (Title VII); *United States v. Wood Lathers Local 46*, 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973) (Title VII); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972) (§ 1983); *United States v. Carpenters Local 169*, 457 F.2d 211 (7th Cir.), cert. denied, 409 U.S. 851, 93 S.Ct. 63, 34 L.Ed.2d 94 (1972) (Title VII); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971) (en banc), cert. denied, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972) (§ 1983); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971) (Title VII); *Contractors Ass'n of Eastern Pa. v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971) (Title VII); *United States v. Local 38, IBEW*, 428 F.2d 144 (6th Cir.), cert. denied, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970) (Title VII); *Local 53, Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969) (Title VII).¹⁸ While the defendants argue § 703(j) of Title VII forbids the imposition of racial quota hiring, even were this to be an order premised solely on Title VII, we note this view has been uniformly rejected by the many courts which have considered the question.

We believe the district court properly exercised its discretion in ordering affirmative action to be undertaken to erase the effects of past discrimination. We do not believe that such relief may be limited to the identifiable persons denied employment in the past

¹⁸*Harper v. Kloster*, 486 F.2d 1134 (4th Cir. 1973) did not hold to the contrary, but upheld the district court's refusal to impose quotas within the facts of that case as not being an abuse of discretion.

—for “the presence of identified persons who have been discriminated against is not a necessary prerequisite to ordering affirmative relief in order to eliminate the present effects of past discrimination.” *Carter v. Gallagher*, 452 F.2d at 330.

Nor are remedial goals limited to any specific or prescribed form. The precise method of remedying past misconduct is left largely to the broad discretion of the district court. Goals have been expressed in terms of specific numbers or ratios . . . or percentages

Rios v. Steamfitters Local 638, 501 F.2d at 631 (citations omitted).

While we remand because the district court expressly stated that the reason it ordered identical accelerated hiring of blacks and Mexican-Americans in equal ratios was because of the validity of the 5'7" height requirement, we do not necessarily believe a 1½ ratio was incorrect. The court, however, should reconsider its order in light of our decision that the 5'7" height requirement is invalid and that plaintiffs lacked standing to challenge defendants' use of the 1969 written examination.

The defendants finally argue that the imposition of an affirmative order to hire minority applicants is unnecessary. They argue in effect that they have already commenced and that they can be relied upon further to improve their hiring practices without the added impetus of a court order. The experience of the Court of Appeals for the Fifth Circuit is useful in this regard —“protestations or repentance and reform aimed to anticipate or blunt the force of a lawsuit offer insufficient assurance that the practices sought to be enjoined

will not be repeated.” *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972); accord, *United States v. Oregon State Medical Soc'y*, 343 U.S. 326, 333, 72 S.Ct. 690, 96 L.Ed. 978 (1952). Here the record shows that the defendants had decided to use an unvalidated verbal aptitude test to hire new candidates in 1973 and that the *only* reason the test was not used was notice of this suit. The personnel director of the defendants testified at length at the trial and acknowledged that he was aware of the discriminatory impact such a test would have. Further, the trial judge found that defendants had failed and refused to take necessary affirmative steps to overcome the department's bad reputation in black and Mexican-American communities. We emphasize that this was not a close case—in a community of 29.1% minority population, only 3.3% of the firemen employed by defendants were black or Mexican-American. These factors are hardly persuasive evidence of the defendants' good faith, even were such good faith relevant in fashioning relief.¹⁹ We agree with the district court that an accelerated hiring order is the only way “to overcome the presently existing effects of past discrimination within a reasonable period of time.”

In sum, we believe the district court was wholly justified in deciding to impose affirmative hiring orders upon the defendants.²⁰

¹⁹In *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), a Title VII case, the Supreme Court rejected good faith as a defense, “Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.” *Id.* at 432, 91 S.Ct. at 854. We believe good faith is equally inapplicable to § 1981.

²⁰We do not read *United Air Lines v. Evans*, 431 U.S. 553, 97 S.Ct. 1835, 52 L.Ed.2d 571 (1977) to restrict in any way the affirmative relief ordered in this case.

While it should be obvious to all, we nevertheless repeat the admonition that nothing said by this Court is to be taken as a requirement that the defendants hire any unqualified applicant for the performance of these essential jobs.

AFFIRMED in part, REVERSED in part and REMANDED for further proceedings not inconsistent with this opinion.

WALLACE, Circuit Judge, dissenting:

I respectfully dissent.

Discrimination in employment based upon race, creed or color is a practice inconsistent with the views and aspirations of nearly all Americans and clearly repugnant to the principles upon which our society is built. But even in rooting out such an evil practice, we are bound by certain procedural and jurisdictional limitations which may serve to protect the rights of others.

I think it is clear from the record that the plaintiffs' challenges to two of the three allegedly illegal employment practices are barred by such a jurisdictional limitation. The majority concedes that the named plaintiffs have no standing to attack the defendants' pre-1971 hiring procedures. I agree. I believe it equally plain that they lack standing to challenge the height limitation.

As to the remedy, I conclude that while the plaintiffs may well have standing to challenge the post-1971 hiring procedures, there is a critical issue as to whether the imposition of minority hiring quotas is now warranted given the limited scope of this issue and the circumstances under which the defendants' objectionable conduct occurred. Because the district court imposed quotas based on conduct which in large part has been rejected by the majority as a basis for remedial action, the district judge may well now believe that mandatory quotas are no longer appropriate. Because the question should be resolved in the first instance by the trial judge, I would reverse and remand for reconsideration of the appropriate remedy in light of the limited standing of the plaintiffs and the nature

of the defendants' conduct within the new, limited time frame adopted by the majority in this case.

I. *The Height Limitation*

As an initial matter, it is clear to me that the issue of the 5'7" height limitation was never properly before the district court. The issue comes to us by a curious route. The plaintiffs phrase their request for relief as follows:

The only modification of the Judgment sought in this appeal is an increase of the Mexican-American hiring ratio, such increase to be ordered if there is a reversal by this Court of Appeal of the District Court's conclusion of law that the height standard is job-related and legal. Plaintiffs-appellants did not seek below and do not seek on this appeal, an order enjoining the use of the 5'7" height standard.

Since the plaintiffs do not contest the legality of the height limitation, I do not see how the district judge erred in taking the height limitation into account in fashioning the remedy.

But even assuming the height limitation is properly at issue, the parties before us do *not* have standing to pursue it. None of the named plaintiffs is alleged to be shorter than 5'7". To the contrary, it has been stipulated that all of the named plaintiffs are present employees or presently on an eligibility list. Since one of the requirements is a minimum height of 5'7", each of them must be at least that tall. Consequently, none of them have suffered an injury-in-fact from the alleged discriminatory practice. In addition, since the class was certified as "all present and future . . .

Mexican-American applicants," some of whom will surely be less than 5'7" tall, the named plaintiffs cannot properly represent them because their interests are potentially antagonistic. Fed.R.Civ.P. 23(a)(3), (4). Indeed, applicants 5'7" or taller have an interest in limiting the number of their competitors by retaining the height requirement. This may be the reason why the plaintiffs did not ask that the height limitation be enjoined but merely now seek a larger hiring quota for Mexican-Americans in spite of it. These facts amply demonstrate the need for and the protection built into standing requirements. Although this lack of standing is obvious, it is not even discussed by the majority.

II. *The Pre-1971 Examination Procedures*

The villain of the pre-1971 examination procedures was a discriminatory written test used as a ranking device. All hiring was done from an eligibility list which was the final product of an examination process. The process began with the written test and a physical agility test and the top scorers were then selected for oral interviews. A total score was given each applicant, with the discriminatory written test having a 35 percent weighted value. The highest ranking candidates were certified for placement on the eligibility list from which vacancies were filled. When the list was exhausted, which usually happened in about two years, a new examination process would begin in order to produce a new eligibility list.

The district court held that the plaintiffs made out a prima facie case of employment discrimination by proving that at the time the complaint was filed in 1973, only 3.3 percent of the firemen employed by the defendants were black or Mexican-American despite

the fact that those minorities accounted for approximately 29.1 percent of the population of Los Angeles County.¹ These employment statistics are necessarily the result of the defendants' pre-1971 hiring practices since no firemen were hired thereafter until the complaint was filed. But the majority admits that the plaintiffs lacked standing to challenge these practices. Consequently, the pre-1971 practices were entitled to only a narrowly restricted role in the fashioning of the remedy in this case, as explained in part III. C. below.

III. *The Post-1971 Examination Procedures*

A. *The Facts*

Prior to accepting applications for a new examination procedure in 1971, the entire procedure was changed. Since the named plaintiffs' applications were processed under these new procedures, they clearly have standing to litigate their legality. Given the limited scope of the claim, however, I question the appropriateness of the sweeping injunctive relief granted.

The new procedures were to be as follows. Written tests were to be eliminated as a ranking device, but because of the large number of applicants (3500) and the relatively few job openings (33), some method had to be adopted to limit the number of applicants interviewed. Thus a new written test was designed in an attempt to eliminate cultural bias. The test was to be given and graded on a pass-fail basis for the sole purpose of screening out illiterates. Five hundred of the passing applicants were to be selected at random

¹The district court found that 10.8 percent of the population of Los Angeles County was black and 18.3 percent Mexican-American.

for oral interviews. This method eliminated the written test as a ranking device and gave every passing applicant an equal opportunity to be chosen for an oral interview. Ninety-seven percent of the applicants passed the written test; 1,885 were white, 170 black and 283 Mexican-American. The passing applicants were to be ranked solely on the basis of the results of the physical agility test and the oral interviews.

The new written test was administered in 1972, but before the random selection could be made, a lawsuit was filed in state court against the county, charging that the random selection process violated provisions of the county charter and civil service regulations requiring that selection for oral interviews be made on merit. The county was enjoined from using this method pending trial on the merits. As a result, the examination process was halted for over two years and no interviews or physical tests were given and no eligibility list was certified.

As vacancies increased, the county fire department urged that the applicants who by this time had been waiting for almost 18 months, be interviewed and an eligibility list certified. In desperation, the county Department of Personnel proposed to interview those applicants who had received the top 544 scores on the 1972 written test. Of this number, 492 were white, 10 black and 33 Mexican-American. These applicants were not to be ranked on the basis of the test results, however, and the interviews were not intended to eliminate the remaining applicants from consideration. The purpose was solely to expedite the hiring of sufficient firemen to meet the immediate, urgent requirements of the fire department.

The plaintiffs herein objected to this proposal. Upon learning of the complaint about to be filed in this action, the Director of Personnel abandoned the plan and implemented a new procedure whereby all of the passing applicants would be interviewed. The interviews commenced on January 20, 1973.

The plaintiffs filed this civil rights action naming as defendants the County of Los Angeles, the Board of Supervisors of the county and the Civil Service Commission. The complaint alleged racial discrimination in violation of 42 U.S.C. §§ 1981 and 1983; it was later amended to invoke Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.* as well. The defendants completed interviewing all of the applicants by the end of March 1973 and certified an eligibility list. Of the top 315 applicants on this list, 210 were white, 39 black, 59 Mexican-American and 7 of other races (a total of 33.5 per cent "minorities"). It was conceded by the plaintiffs that this examination and ranking procedure did not have a discriminatory impact on blacks and Mexican-Americans.

At the conclusion of the trial, the district court specifically found that the defendants had not interfered with affirmative action efforts designed to increase black and Mexican-American participation rates and that, to the contrary, several officials had engaged in efforts designed to increase minority representation in the fire department. The court further found that neither the defendants nor their officials had engaged in employment practices with a willful or conscious purpose of excluding blacks and Mexican-Americans from employment.

The court concluded, however, that the defendants had engaged in the discriminatory employment practice

of utilizing as a selection device non-validated written tests that had a disproportionate detrimental impact on blacks and Mexican-Americans. This evidently included the defendants' short-lived intent to interview only the top 544 scorers on the 1972 examination. This, of course, is the *only* examination procedure of which the plaintiffs may complain since they lack standing to challenge all previous examinations.

B. *Liability for the Attempted Use of the 1972 Examination*

In deciding that the attempted use of the 1972 written examination was illegal, the majority relies almost exclusively upon 42 U.S.C. § 1981. Only in a footnote is it mentioned that this same conduct also constitutes a Title VII violation.² I agree with the majority that under *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-33, 73 S.Ct. 894, 97 L.Ed. 1303 (1953), the defendants' decision, prompted by the commencement of this lawsuit, not to use improperly the 1972 examination as a selection device, does not shield them from liability. But I would base that liability on Title VII, not section 1981. The majority's

²Even if they had had proper standing, the plaintiffs could not have attacked defendants' pre-1972 procedures under Title VII since that statute first became applicable to state public employers on March 24, 1972. Since a stipulation states that the defendants abandoned their plan to make a discriminatory use of the 1972 exam on January 8, 1972, Title VII is arguably unavailable to the plaintiffs as a basis of liability in this case. In that event, and in light of the subsequent analysis in the text, the defendants would be absolved of all liability whatsoever. It appears, however, that the stipulated date may be in error, and in addition it seems to me that a persuasive argument can be made that the threat to use the 1972 examination in a discriminatory manner can fairly be construed as continuing after March 24, 1972, thus providing a legitimate basis for some relief to the plaintiffs.

extensive discussion of section 1981 is not only incorrect, but in this case it is wholly unnecessary.

The district judge found as a matter of fact that "neither the defendants nor their officials had engaged in employment practices with a willful or conscious purpose of excluding blacks and Mexican-Americans from employment." Since a *prima facie* case under Title VII clearly does not require proof of an improper purpose when a discriminatory impact is alleged, *Griggs v. Duke Power Co.*, 401 U.S. 424, 912 S.Ct. 849, 28 L.Ed.2d 158 (1971), this finding does not put defendants beyond the reach of Title VII.

The majority's decision that section 1981 similarly requires no proof of intentional discrimination is both unnecessary and unfortunate. The potential scope of section 1981 is exceptionally broad, going far beyond the Title VII realm of employment, and conceivably reaching virtually all private contractual arrangements. See *Runyon v. McCrary*, 427 U.S. 160, 168-71, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). Since the relief available under Title VII is extensive enough to include the remedy approved by the majority in this case,³ the wiser course would be to base the finding of liability on that statute and to wait for a more appropriate opportunity to consider the reaches of section 1981. Since the majority does choose to rely upon section 1981, however, I wish to make it clear that I cannot accept its easy conclusion that a *prima facie*

³"[T]he remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981" *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459, 95 S.Ct. 1716, 1719, 44 L.Ed.2d 295 (1975), quoting H.R.Rep. No. 92-238, 92nd Cong., 1st Sess. 19 (1971).

case under that statute does not require proof of discriminatory intent.

The majority asserts that the Supreme Court's opinion in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), does not address the question of whether cases brought under section 1981—like those brought directly under the Fourteenth Amendment—always require proof of discriminatory intent, or whether—as in Title VII cases—proof of discriminatory impact alone may be sufficient.⁴ I agree. But *Washington v. Davis* serves at least to remind us that improper intent may be an essential ingredient in some discrimination cases where the lower courts have heretofore thought otherwise. When it is necessary to decide such

⁴As the majority notes in footnote 7 of its opinion, few courts have had occasion to construe section 1981 in light of *Washington v. Davis*. Of those which have dealt with the issue explicitly, most have done so without analysis, e.g., *Kinsey v. First Regional Securities, Inc.*, 557 F.2d 830, 838 n.22 (D.C.Cir. 1977), or under the assumption, rejected by us today, that *Washington v. Davis* did decide the section 1981 question. E. g., *League of United Latin Am. Citizens v. City of Santa Ana*, 13 FEP Cases 1019-20 (C.D.Cal. 1976). The only post-*Washington v. Davis* cases I have located that shed any light on the problem support the position taken in this dissent. *Crocker v. Boeing Co.*, 437 F.Supp. 1138 (E.D.Pa. 1977); *Johnson v. Hoffman*, 424 F.Supp. 490, 493-94 (E.D.Mo. 1977).

Significantly, the Supreme Court vacated and remanded the Tenth Circuit's decision in *Chicano Police Officer's Ass'n v. Stover*, 526 F.2d 431 (10th Cir. 1975), cert. granted, vacated, and remanded, 426 U.S. 944, 96 S.Ct. 3161, 49 L.Ed.2d 1181 (1976), in which it was held that "the measure of a claim under the Civil Rights Act [i.e., section 1981 et seq.] is in essence that applied in a suit under Title VII of the Civil Rights Act of 1964." 526 F.2d at 438. *Stover* did not involve Title VII, but turned on sections 1981, 1983, and 1985, suggesting that the Supreme Court may well believe that constitutional standards apply in section 1981 cases. This is the interpretation placed on the Supreme Court's action by the Tenth Circuit panel that originally decided *Stover*, as evidenced by their treatment of the case on remand. *Chicano Police Officer's Ass'n v. Stover*, 552 F.2d 918, 920 (10th Cir. 1977).

cases on the basis of authority other than Title VII or the Fourteenth Amendment, therefore, a most careful reconsideration of the role of discriminatory intent is in order.

The majority reasons that because both Title VII and section 1981 apply to employment discrimination cases, because the remedies available under these two statutes are "parallel or overlapping," *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 & n.7, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), and because *Washington v. Davis* does not decide that intentional discrimination is required under section 1981, "there remains no operational distinction in this context between liability based upon Title VII and section 1981." This analysis is inadequate.⁵

⁵The majority's analysis is not helped by the string of citations offered in support of the propositions that section 1981 has been applied "to bar discrimination in employment," and that Title VII principles are a "benchmark" in discrimination cases. The burden of these cases is that section 1981 provides a cause of action for private acts of employment discrimination and that it was not implicitly repealed by Title VII. I do not disagree. If any of these decisions arguably imply that section 1981 and Title VII are equivalent with respect to the required elements of a *prima facie* case, it should be noted that all but two of them were rendered prior to *Washington v. Davis*, and of those, none offers any analysis of the critical issue of discriminatory intent which the opinion in that case revived as a major factor in discrimination law. The two post-*Washington v. Davis* decisions, *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277 (7th Cir. 1977) and *McCormick v. Attala County Bd. of Educ.*, 541 F.2d 1094 (5th Cir. 1976), make no reference to *Washington v. Davis* or to the issues it discussed. Thus, none of these cases contributes much to the resolution of the issue at hand.

Actually, one of the Fifth Circuit cases relied upon by the majority, *Wade v. Mississippi Coop. Extension Serv.*, 528 F.2d 508 (5th Cir. 1976), undermines the majority's position. *Wade* specifically rejected the lower court's application to section 1981 of "the standard of proof established by the regulations implementing Title VII" and held that "[u]nder the law of this circuit, . . . public employment tests are to be judged under a constitutional standard in suits brought under 42 U.S.C.A.

That both statutes can apply to the same facts and that both may afford similar remedies is beside the point. The same can be said of Title VII and the Fourteenth Amendment, yet, after *Washington v. Davis*, there remains an essential "operational distinction" between them. The proper inquiry is whether the legislative history of section 1981 indicates that it *should* track the Fourteenth Amendment's standards of proof rather than those of Title VII. I believe that the history of section 1981 strongly suggests precisely that.

Because section 1981 is peculiarly linked to the Fourteenth Amendment, the standards pertaining to that amendment should also control section 1981. Of course, Title VII also depends in part upon the Fourteenth Amendment for its validity.⁶ Title VII, however, was intentionally structured to rest upon as many other constitutional bases as possible.⁷ It is otherwise with

§§ 1981, 1983." *Id.* at 518 (emphasis added). The court in *Wade*, although it had the foresight to recognize that *Washington v. Davis*, then pending before the Supreme Court, could affect its understanding of the issues in the case before it, *id.* at 518 n.7, unavoidably lacked the wisdom later supplied by *Washington v. Davis* that purposeful discrimination is one element of the constitutional standard. But of interest here is the Fifth Circuit's recognition that section 1981 tracks the Constitution, not Title VII, in its standards of proof.

⁶E. g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447-48, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) (1972 amendments to Title VII rely upon Fourteenth Amendment). With respect to section 1981, see subsequent text.

⁷In his June 19, 1963 message to Congress, President John Kennedy submitted a proposed bill which developed into the Civil Rights Act of 1964 and which contained the embryo of what is now Title VII. The proposed bill was expressly made to rely upon

the exercise by Congress of the powers conferred upon it to regulate the manner of holding Federal Elections, to enforce the provisions of the fourteenth and fifteenth amendments, to regulate commerce among the several

(This footnote is continued on next page)

section 1981. Section 1981 originated in two earlier statutes: section 1 of the Civil Rights Act of 1866, 14 Stat. 27, and section 16 of the Voting Rights Act of 1870, 16 Stat. 144. *Runyon v. McCrary*, *supra*, 427 U.S. at 168-70 n.8, 96 S.Ct. 2586. The 1866 Act is generally regarded as a "Thirteenth Amendment statute," *see Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422, 437-38, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), but it has also been found to rely upon the Fourteenth Amendment. In fact, part of the motivation behind the congressional support of the Fourteenth Amendment was to eliminate doubts about the constitu-

States, and to make laws necessary and proper to execute the powers conferred upon it by the Constitution. H.R.Doc. No. 124, 88th Cong., 1st Sess. 14 (1963). That the present version of Title VII rests on more than the Civil Rights Amendments may also be seen in the deliberate inclusion of interstate commerce concepts in Title VII's definitions, signifying a reliance upon the Commerce Clause. 42 U.S.C. § 2000e (b)-(e), (g) & (h). *Cf. Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 249-50, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (Title II of Civil Rights Act of 1964 valid under the Commerce Clause).

Several courts of appeals, including our own, have found that Title VII extends beyond the reach of the Equal Protection Clause. *E. g., Berg v. Richmond Unified School Dist.*, 528 F.2d 1208, 1212 n.8 (9th Cir. 1975), *cert. granted*, 429 U.S. 1071, 97 S.Ct. 806, 50 L.Ed.2d 788 (1977); *Satty v. Nashville Gas Co.*, 522 F.2d 850, 855 (6th Cir. 1975), *cert. granted*, 429 U.S. 1071, 97 S.Ct. 806, 50 L.Ed.2d 788 (1977); *Communications Workers v. American Tel. & Tel. Co.*, 513 F.2d 1024, 1031 (2d Cir. 1975), *cert. granted, vacated and remanded*, 429 U.S. 1033, 97 S.Ct. 724, 50 L.Ed.2d 744 (1977). Although the holdings in these cases that the exclusion of pregnant women from certain insurance and other employment benefits have been undermined or put in doubt by *General Elec. Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), the *Gilbert* decision itself does not question the idea that Title VII invokes congressional powers beyond those derived from the Fourteenth Amendment. Rather, *Gilbert* simply holds that the exclusion of pregnancy benefits from an employer's disability insurance plan does not constitute a sex-based discrimination capable of invoking either Title VII or the Fourteenth Amendment, *Id.* at 136, 97 S.Ct. 401.

tionality of the 1866 Act. *Id.* at 436, 88 S.Ct. 2186. The second root of section 1981, section 16 of the Voting Rights Act of 1870, is clearly a "Fourteenth Amendment statute," *Runyon v. McCrary*, *supra*, 427 U.S. at 195-202, 96 S.Ct. 2586 (White, J. dissenting); its legislative history demonstrates that its precise purpose was to implement the congressional powers created by that Amendment. *Id.*

The significance of this is that section 1981 enjoys a unique historical and conceptual relationship to the Fourteenth Amendment which is not shared by Title VII.⁸ Consequently, it is quite proper to assume, absent a contrary holding by the Supreme Court, that the standards for establishing a *prima facie* case of discrimination under section 1981 and the Equal Protection Clause of the Fourteenth Amendment should be the same: there must be proof of discriminatory intent.

Other factors reinforce this conclusion. Interpreting section 1981 to require discriminatory intent is consistent with the Supreme Court's statement in *Jones v. Alfred H. Mayer Co.*, *supra*, that Congress intended section 1 of the Civil Rights Act of 1866—the source of what is now section 1982 as well as one source of section 1981—"to prohibit *all racially motivated* deprivations of the rights enumerated in the statute . . ." *Id.* 392 U.S. at 426, 88 S.Ct. at 2196 (emphasis partly added). That racial motivation was originally

⁸As *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), makes clear, section 1981 is also very closely tied to the Thirteenth Amendment. *Washington v. Davis* did not decide whether discriminatory intent is required in Thirteenth Amendment cases. I think that it is, but any uncertainty in this assumption merely underscores that the majority's decision to delve into section 1981 is unwise.

meant by Congress to be a requirement in actions under the 1866 Act is further suggested by section 2 of the Act which imposes criminal penalties upon anyone who, under color of law, deprives another of the rights protected by section 1 "by reason of his color or race." 14 Stat. 27.⁹

In addition, there are practical reasons for requiring proof of discriminatory intent in section 1981 cases, but not in Title VII cases. Title VII is part of a complex statute; together with its accompanying administrative regulations it identifies with particularity the conduct it proscribes and imposes a course of administrative remedies that must be exhausted before the jurisdiction of the courts may be invoked. 42 U.S.C. § 2000e-5; 29 C.F.R. §§ 1601.1 *et seq.* Because these barriers tend to eliminate claims that are frivolous or suffering from obvious legal or factual defects, it is not unreasonable to provide that a *prima facie* case may be established without a showing of discriminatory intent.

Section 1981 is a very different statute. Its language is both brief and sweeping in scope, and it does not have the screening mechanism provided by a requirement of the exhaustion of administrative remedies. The section 1981 screening mechanism, as in actions proceeding directly under the Fourteenth Amendment, is the required demonstration of discriminatory intent.

Indeed, because section 1981 can probably be invoked in a great many cases brought directly under

⁹In addition, the original draft of the 1866 Act, as introduced by Senator Trumbull of Illinois, prohibited "discrimination in civil rights or immunities . . . on account of race, color, or previous condition of slavery . . ." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 288, 96 S.Ct. 2574, 2582, 49 L.Ed.2d 493 (1976) (emphasis added).

the Fourteenth Amendment, the consequence of judicially creating a less demanding standard for section 1981 than for the Fourteenth Amendment might often be to circumvent the holding in *Washington v. Davis* altogether. In the vast array of cases such as the one before us now and *Washington v. Davis* itself, where Title VII does not apply but Section 1981 and the Fourteenth Amendment do, one could easily avoid the intent requirement of the Amendment by simply pleading section 1981.¹⁰ See *Crocker v. Boeing Co.*, 437 F.Supp. 1138 (E.D.Pa. 1977).

Finally, an observation made by the Supreme Court in *Washington v. Davis* is relevant here. The Court was concerned about the problems that might arise if the Fourteenth Amendment could be invoked upon a mere showing of disproportionate racial impact:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Given that rule, such consequences would perhaps be likely to follow. However, in our view,

¹⁰In *Washington v. Davis*, the plaintiffs did plead section 1981. The defendants here argue that in that decision section 1981 was implicitly held to require discriminatory intent. The plaintiffs argue that the opposite implication exists. Both sides have a certain logical basis, but a close reading of the Supreme Court's opinion convinces me, as it does the majority, that *Washington v. Davis* simply does not consider the standards governing section 1981.

extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.

426 U.S. at 248, 96 S.Ct. at 2051 (footnote omitted) Section 1981, extending as it does far beyond "the field of public employment" to the expansive realm of both public and private contractual relationships, might well precipitate many of these same consequences if proof of discriminatory intent is not required.

For these reasons I would base defendants' liability for the use of the 1972 examination on Title VII alone. The majority's reliance on section 1981 is ill-advised because it is both unnecessary and incorrect.

C. *The Scope of the Remedy*

Even if the plaintiffs have established a Title VII violation with respect to the defendants' use of the 1972 written test results, however, that violation does not necessarily justify the imposition of minority hiring quotas on the defendants. The use of quotas must be carefully weighed. As the Supreme Court stated in *Griggs v. Duke Power Co.*, *supra*, 401 U.S. at 430-31, 91 S.Ct. at 853:

Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of

artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

In this case the trial judge ordered that 20 percent of all newly-hired firemen be black and that 20 percent be Mexican-American, compared to the respective proportions of those minorities in the population of 10.8 percent and 18.3 percent. Imposition of this hiring quota may well result in discrimination against equally or better qualified applicants solely on account of their race. Here, for example, a native American Indian, Asian-American, Hungarian-American or Polish-American may not be hired in order to provide a job for a black or Mexican-American. While quotas are sometimes necessary to correct past discrimination against certain groups, the possible prejudicial effects upon others must be weighed carefully by the district court.¹¹

In civil rights cases, "[a]s with any equity case, the nature of the violation determines the scope of

¹¹See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976) (section 1981 and Title VII prohibit racial discrimination in private employment against white persons as well as against nonwhites). Cf. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 780-81, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (Burger, C. J., concurring and dissenting) (white employees injured by award of retroactive seniority to nonwhites may petition for equitable relief on their own behalf); *Weber v. Kaiser Alum. & Chem. Corp.*, 415 F.Supp. 761 (E.D.La. 1976) (Title VII prohibits discrimination against white employees; private employment context).

I agree, of course, that equitable relief to rectify past discrimination will often impose burdens on those innocent of any discriminatory activity. *Franks v. Bowman Transp. Co.*, *supra*, 424 U.S. at 773-79, 96 S.Ct. 1251. But, as I explain in the subsequent text, relief appropriate to the violation in this case requires the imposition of no such burdens.

the remedy." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971). *Accord*, *Milliken v. Bradley*, 418 U.S. 717, 744, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). In fashioning remedies under Title VII, it is therefore essential to identify accurately the nature of the violations that have occurred. Here, the district judge believed he had properly found the defendants liable not only for their thwarted attempt to use the 1972 exam results in a discriminatory manner, but also for their use in earlier years of the examinations which actually produced the racial imbalance in the fire department's work force. It is obvious that the quotas were imposed to remedy that racial imbalance,¹² and thus that in devising his hiring order, the district judge relied heavily upon his conclusion that the defendants were liable for their use of the pre-1972 examinations. For the reasons that follow, this reliance was misplaced.

The majority concedes that none of the defendants' examination procedures except the aborted attempt to use the 1972 exam results in a discriminatory manner were properly before the district court. I agree. The complete absence of standing on the part of any plaintiff to contest the earlier procedures makes them legally indistinguishable from the act described in *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), which could have been, but was not, properly brought before a federal court:

¹²In his conclusions of law, the district judge stated:

[I]t appears that unless the Court orders accelerated hiring at the Los Angeles County Fire Department, there will not be sufficient hiring of blacks and Mexican-Americans as is necessary to overcome the presently existing effects of past discrimination within a reasonable period of time (Emphasis added.)

A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

Id. at 558, 97 S.Ct. at 1889.¹³ Therefore, the district court was not entitled to treat the pre-1972 examination procedures as substantive violations to be corrected, but only as "relevant background" to the narrow issues properly before him.

Moreover, even if the pre-1972 examinations could be properly considered by the district judge as background, their relationship to the defendants' Title VII violation militates against taking them heavily into account. The remedial obligation of the district court was first and foremost to grant relief for the violations of law properly found to exist. It is true that judicial remedies sometimes attempt to correct past discrimination as well, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), but this is because present violations often "operate to 'freeze' the status quo of prior discriminatory employ-

¹³It is not only the standing issue that made it improper for the district court to rely upon the pre-1972 procedures in fashioning its remedial order, but also the fact that even a plaintiff with standing could probably not have shown them to be illegal. Since Title VII first became applicable to the defendants on March 24, 1972, liability for the defendants' conduct previous to that date must be evaluated under section 1981. But that statute, as I explain above, appears to require proof of a discriminatory intent, and the district judge explicitly found as a matter of fact that such intent was lacking here.

ment practices." *Griggs v. Duke Power Co.*, *supra*, 401 U.S. at 430, 96 S.Ct. at 853.

The Title VII violation in this case had no such effect. Both the majority and I agree that the defendants are liable for nothing more than devising a plan—never carried out—which would have had a discriminatory impact. The plaintiffs concede in their brief that in fact "the post-March 1972 discrimination . . . had no 'effects.'" Because the racial imbalance of which the plaintiffs complain was neither aggravated nor perpetuated by the defendants' actionable discrimination, the liability of defendants for that limited threat of discrimination does not create a proper platform from which to reach back to correct the racial imbalance.¹⁴

Even under the majority's view of this case, a remand is essential. Had the district judge initially found the defendants liable for as little as this court does today, I cannot believe he would have imposed the drastic remedy which the majority now sustains. It is conceded that the only objectionable "use" of a written examination by the defendants was their intent to narrow the field of applicants to the top 544 scorers on the 1972 exam. This plan was made only after an apparently nondiscriminatory system (interviewing randomly selected applicants who passed the 1972 exam) was enjoined in a state court proceeding. It came when the defendants were under the great stress of needing to fill mounting vacancies and at a time when they

¹⁴"At the threshold we observe that Title VII speaks only to the future. The only justification for a backward gaze is in determining whether a *present* employment practice may, in fact, perpetuate past discrimination." *EEOC v. University of N. M.*, 504 F.2d 1296, 1301 (10th Cir. 1974).

were affirmatively working to end prior discriminatory practices.

In light of these facts, I would reverse and remand to the district court for reconsideration of the appropriateness of quotas in this case.¹⁵ It is clear to me that the court can fashion an effective order prohibiting any discriminatory use of the 1972 examination directly without imposing quotas.

¹⁵It is instructive to compare with this case one from the Second Circuit in which the district court's imposition of quotas was reversed as unwarranted. *Kirtland v. New York State Dept. of Correct. Serv.*, 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976). The case involved a challenge to the use of a discriminatory written test as the basis for promotion under a civil service system. The plaintiffs challenged the disproportionate impact of only the most recent test and made no claim of bad faith or intentional discrimination. The district court ordered the defendants to develop a validated nondiscriminatory promotion procedure and imposed promotion quotas to cure the effects of past discrimination. The Second Circuit upheld the order to develop a nondiscriminatory procedure, but rejected the imposition of quotas. The court also noted that quotas would unnecessarily nullify the stated constitutional provisions requiring that promotions be made from the top three officers on the eligibility list, a decision which should be left to "the people speaking through their legislators." *Id.* at 429.

See also *Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976) (racial quotas in public employment layoffs not designed to remedy past discrimination are not authorized under section 1981 or Title VII).

MAY 30 1978

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1977

No. 77-1553

COUNTY OF LOS ANGELES; BOARD OF
SUPERVISORS OF THE COUNTY OF
LOS ANGELES; and CIVIL SERVICE
COMMISSION OF THE COUNTY OF
LOS ANGELES,

Petitioners,

vs.

VAN DAVIS, HERSEL CLADY and FRED VEGA,
individually and on behalf of all others similarly
situated, WILLIE C. BURSEY, ELIJAH HARRIS,
JAMES W. SMITH, WILLIAM CLADY, STEPHEN
HAYNES, JIMMIE ROY TUCKER, LEON AUBRY,
RONALD CRAWFORD, JAMES HEARD, ALFRED R.
BALTAZAR, OSBALDO A. AMPARAH, individually
and on behalf of all others similarly situated,

Respondents.

OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

A. THOMAS HUNT

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Center for Law in the Public Interest

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COUNTY OF LOS ANGELES; BOARD OF
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Petitioners,

vs.

VAN DAVIS, HERSHEL CLADY and FRED VEGA,
individually and on behalf of all others similarly
situated, WILLIE C. BURSEY, ELIJAH HARRIS,
JAMES W. SMITH, WILLIAM CLADY, STEPHEN
HAYNES, JIMMIE ROY TUCKER, LEON AUBRY,
RONALD CRAWFORD, JAMES HEARD, ALFRED R.
BALTAZAR, OSBALDO A. AMPARAH, individually
and on behalf of all others similarly situated,

Respondents.

**OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1977
No. 77-1553

COUNTY OF LOS ANGELES; BOARD OF
SUPERVISORS OF THE COUNTY OF
LOS ANGELES; and CIVIL SERVICE
COMMISSION OF THE COUNTY OF
LOS ANGELES,

Petitioners,

vs.

VAN DAVIS, HERSHEL CLADY and FRED VEGA,
individually and on behalf of all others similarly
situated, WILLIE C. BURSEY, ELIJAH HARRIS,
JAMES W. SMITH, WILLIAM CLADY, STEPHEN
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STATEMENT OF THE CASE

Defendants' statement of the case found at pages 4-10 in their Petition is incomplete, inaccurate and misleading in several material respects.

Perhaps the most serious defect in Defendants' statement is the failure to state that the primary ground for the District Court's finding of past illegal discrimination and the District Court's finding that a hiring order was required in the instant case was the almost absolute non-existence of minorities in Defendants' workforce despite the existence of a large minority population in Los Angeles County. The District Court's factual and legal rulings on these points are found at 8 FEP Cases 239, 240-42 (C.D. Cal. 1973).

Defendants' statement at page four of their Petition that no discriminatory hiring occurred after the effective date of Title VII of the Civil Right Act of 1964, as amended, 42 U.S.C. §2000e, et seq. ("Title VII") is misleading. A more complete and accurate statement is that in early 1973, almost one year after Title VII became applicable to public employers, Defendants were in the process of knowingly violating Title VII by utilizing practices they knew to be violative of Title VII, but ceased utilization of these practices only upon learning that this lawsuit was being commenced (R. 140-41; R. T. 48-49). Further, the District Court specifically found as a fact that Defendants were utilizing illegal written tests "until learning that this lawsuit was about to commence." 8 FEP Cases 240-41.

It also is misleading for Defendants to argue that the District Court found that there was no deliberate or purposeful discrimination. This finding was made by the District Court when it was believed to be "of no moment." The truth of the matter is that purposeful discrimination was proved to the extent that it was admitted by high officials of the Los Angeles County Fire Department (see Section "I. E." infra).

At page five of Defendants' Petition is found a totally inaccurate statement. Here it is stated that the Ninth Circuit ultimately held that the Plaintiffs had no standing to challenge "any hiring practices occurring before 1972." No such holding was made by the Ninth Circuit. The Circuit Court held only that Plaintiffs lacked standing to challenge one particular pre-1972 test, i.e., a written test administered in 1969; all other pre-1972 practices remain subject to challenge. 566 F.2d 1337-38.

Another totally inaccurate statement is found at page six of the Petition. Here it is stated: "The only named plaintiffs in this case were individuals who had applied for and taken only the 1972 written examination. . . ." The Plaintiffs also include minority firemen already on the job. See the Findings of Fact at 8 FEP Cases 240, para. 1.

SUMMARY OF ARGUMENT

The reasons this Court should refuse to grant Defendants' Petition for Writ of Certiorari on the 42 U. S. C. §1981 ("§1981") issue are as follows:

1. This Court already has ruled on the issue whether the Title VII standards for liability are applicable to employment discrimination cases brought pursuant to §1981 in its decisions in Johnson v. Ry. Express Agency, Inc., 421 U. S. 454 (1975) and Washington v. Davis, 426 U. S. 229 (1976).
2. The Circuit Court ruling in the instant case is consistent with accepted principles of statutory construction.
3. There is no conflict among the circuits concerning the §1981 issue; indeed, all circuits which have addressed the issue are in accord with the ruling in the instant case.
4. A ruling by this Court on whether purposeful discrimination is required under 42 U. S. C. §1981 would not affect the outcome of this case because purposeful discrimination was proven, indeed admitted, at the trial below.

This Court should refuse to grant Defendants' Petition on the remedial hiring order issues for the following reasons:

1. The Circuit Court's decision on the appropriateness of the remedial hiring order herein is in accord with this Court's decision in International Brotherhood of Teamsters v. United States, 431 U. S. 324 (1977).
2. There is no conflict among the circuits concerning the remedial hiring order issues presented by Defendants' Petition.
3. The specific grounds Defendants raise for the proposition that the remedial hiring order was beyond the District Court's jurisdiction do not distinguish the instant case from those in which such relief has been upheld.

ARGUMENT

I

PURPOSEFUL DISCRIMINATION NEED NOT BE PROVED UNDER 42 U. S. C. §1981

Defendants have vigorously contended in their Petition for Writ of Certiorari that before a violation of 42 U. S. C. §1981 is made out,

plaintiff must show purposeful, i.e., willful or deliberate, discrimination based on race.

There is no merit to Defendants' assertions. Firstly, the contention by Defendants is contrary to this Court's prior holding in Washington v. Davis, the very decision upon which Defendants so heavily rely. Secondly, the Ninth Circuit's holding in the instant case is consistent with long-settled canons of statutory construction. And thirdly, contrary to Defendants' assertions, there is no conflict in the Circuits; in fact all Circuits which have addressed the point have made express rulings which are consistent with the ruling of the Ninth Circuit in the instant case.

It also is the position of plaintiffs that even if purposeful discrimination is required to prove a violation of §1981, such a holding would not affect the outcome of the instant case.

A. THIS COURT ALREADY HAS
HELD THAT PURPOSEFUL
DISCRIMINATION IS NOT
REQUIRED UNDER 42 U.S.C.
§1981

Defendants' reliance upon Washington v. Davis for the proposition that purposeful discrimination must be proved under 42 U.S.C. §1981 is misplaced. This reliance is misplaced to the extent that the Washington v. Davis decision

contains a contrary holding. This is the case because a careful reading of the opinion in Washington v. Davis shows that: (a) the decision in Washington v. Davis that purposeful discrimination is necessary to make out a violation, found in Part "II" of the Washington v. Davis opinion, is strictly limited to cases based on the equal protection provisions of the Fifth and Fourteenth Amendments and does not extend to cases grounded on statutes; and (b) in Part "III" of the Washington v. Davis opinion, in which §1981 and a local District of Columbia statute are construed, the Court specifically interprets and construes §1981 and in doing so places the burden of proving "business necessity" upon employers sued under §1981 upon a mere statistical showing of adverse impact without a showing of purposeful discrimination.

A review of the procedural context in which Washington v. Davis reached the Court is helpful to a proper understanding of the opinion. In Part "I" of the Court's opinion, the procedural setting giving rise to the appeal is described at 426 U.S. 233-34 as follows:

"These practices [including the written test] were asserted to violate respondents' rights 'under the due process clause of the Fifth Amendment to the United States Constitution, under 42 U.S.C. §1981 and under D.C. Code §1-320.' * * * Respondents then filed a motion for summary judgment with respect to the recruiting phase of the case, seeking a declaration

that the test administered to those applying to become police officers is 'unlawfully discriminatory and therefore is violation of the Due Process Clause of the Fifth Amendment. . . .' No issue under any statute or regulation was raised by the motion. The District of Columbia defendants, petitioners here, and the federal parties also filed motions for summary judgment with respect to the recruiting aspects of the case asserting that respondents were entitled to relief on neither constitutional nor statutory grounds." (Emphasis added; footnotes omitted.)

Part II of the Court's opinion is limited to a discussion of the issues involved in the respondent's motion which "rested on purely constitutional grounds. . . ." The Court premised its remarks in Part II by stating that "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standard applicable under Title VII, and we decline to do so today." After a long discussion of equal protection cases brought under the Fifth and Fourteenth Amendments and 42 U.S.C. §1983, the Court held that purposeful discrimination, rather than solely racially disproportionate effect, must be shown to establish a claim under the constitutional equal protection provisions. The Court, therefore, concluded as follows:

"Because the Court of Appeals erroneously applied the legal standard applicable to Title VII cases in resolving

the constitutional issues before it, we reverse its judgment in respondents' favor." 426 U.S. at 238. (Emphasis added.)

* * *

"[I]t was error [for the Court of Appeals] to direct summary judgment for respondents based on the Fifth Amendment." 426 U.S. at 248.

In Part "III" of the Washington v. Davis decision, this Court then proceeded to discuss the issues involved in the petitioners' summary judgment motion that were not disposed of by its holding in Part "II." Thus, Part "III" deals exclusively with the issues concerning the statutory causes of action under §1981 and D.C. Code §1-320, the constitutional issues having been disposed of in Part "II." And, most importantly, in this Part "III" the Court applies the most basic principle of Title VII law, to wit: a mere statistical showing that an employment practice has an adverse impact upon a minority group shifts the burden to the employer to prove job-relatedness regardless of whether purposeful discrimination has been shown.

There can be no real question but that in Part "III" of the Washington v. Davis opinion, the Court was construing §1981 along with a District of Columbia local code section. The second paragraph of Part "III" of the opinion specifically notes that the defendant employer's motion for summary judgment (which is what was being discussed in Part "III") was based upon an

argument that the written test at issue "complied with all applicable statutory . . . requirements; and they appear not to have disputed that under the statutes and regulations governing their conduct standards similar to those obtaining under Title VII had to be satisfied." (Emphasis added.) Since the Court in the first paragraph of Part "I" of the opinion specifically noted that the case was brought under §1981, and indeed in footnote two quoted §1981 in its entirety, and since the Court in Part "III" as quoted immediately above stated that it was construing "all applicable statutes" (plural, not singular), and since Title VII principles were applied by the Court in Part "III" of the Washington v. Davis opinion, it follows that this Court has adopted and applied Title VII principles while construing §1981. It is most noteworthy that the Title VII principle applied under §1981 in Part "III" of Washington v. Davis was the very principle at issue on this Petition -- whether in the absence of purposeful discrimination the burden to prove job-relatedness shifts to the employer upon a showing of statistical adverse impact.

The Ninth Circuit's holding that Title VII standards for liability apply in §1981 employment discrimination cases also is in accord with this Court's decision in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). Here this Court ruled at 421 U.S. 459 that:

"Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of

other remedies he possesses and is not limited to Title VII in his search for relief. '[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.' Alexander v. Gardner-Denver Co. 415 U.S. at 48, 39 L.Ed. 2d 147, 94 S.Ct. 1011. In particular, Congress noted 'that the remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. §1981 [42 U.S.C.S. §1981], and that the two procedures augment each other and are not mutually exclusive.' H.R. Rep. No. 92-238, p. 19 (1971). See also S. Rep. No. 92-415, p. 24 (1971)." (Emphasis added.)

It is submitted that since the "remedies available" under Section 1981 are "co-extensive" with those under Title VII, it is inconceivable that the most basic standard for establishing liability under the two statutes, i.e., whether purposeful intent is required, would not be identical under both statutes. It is submitted that when this Court spoke of "remedies" in Johnson v. Railway Express, the Court was not speaking in the narrow sense of "relief," but rather in the broad sense of a "remedy for a wrong." When "remedy" is used in this latter

sense, and when it is stated that under the two statutes the "remedies" are "co-extensive," it follows that the standards for liability under the two statutes must be identical.

B. THE NINTH CIRCUIT'S
§1981 RULING IS CONSISTENT
WITH WELL ESTABLISHED
PRINCIPALS OF STATUTORY
CONSTRUCTION AND WITH
42 U. S. C. §1988

A central holding of this Court in Johnson v. Railway Express Agency, Inc., 421 U. S. 454, 459-60 (1975) was stated as follows:

"Although this Court has not specifically so held, it is well settled among the Federal Courts of Appeals - and we now join them - that §1981 affords a federal remedy against discrimination in private employment on the basis of race."

Thus, this Court in Johnson at the least recognized that Title VII and §1981 provide overlapping statutory bases for employment discrimination actions.

The holding of the Ninth Circuit that these overlapping statutes should be construed consistently by incorporating Title VII standards into §1981 is compelled by long-established principals of statutory construction. Indeed,

more than a century ago this Court stated in United States v. Freeman, 3 How. 556, 564-65 (1845) that:

"The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts in pari materia are to be taken together, as if they were one law. (Doug., 30; 2 Term. Rep., 387, 586; 4 Maule & Selw., 210.) If a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute (Lord Raym., 1028); and if it can be gathered from a subsequent statute in pari materia, what meaning the Legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. (Morris v. Mellin, 6 Barn. & Cress., 454; 7 Barn. & Cress., 99.)" (Emphasis added.)

Similarly, in Cope v. Cope, 137 U. S. 682, 688-89 (1891), this Court provided that:

"These several Acts of Congress, dealing as they do with the same subject matter, should be construed not only as expressing the intention of Congress at the dates the several Acts were passed,

but the later Acts should also be regarded as legislative interpretations of the prior ones."

See also Tiger v. Western Investment Co., 221 U.S. 286 (1910).

The Fourth Circuit very recently has specifically applied the above reasoning while incorporating Title VII principles into §1981. Johnson v. Ryder Truck Lines, Inc., ___ F.2d ___ (4th Cir., May 2, 1978; No. 76-1293). Here the plaintiffs were contending that this Court's holding in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) was inapplicable on the theory that Teamsters applies only to Title VII cases. The Fourth Circuit ruled as follows at page eight of the slip opinion:

"Ordinarily, §1988 enables a district court to utilize Griggs's interpretation of Title VII in §1981 employment discrimination suits, but the court cannot transgress the limitation placed on the Griggs rationale in Teamsters with respect to §703(h). A ruling that a seniority system which is lawful under Title VII is nevertheless unlawful under §1981 would disregard the precepts of §1988."

The Fourth Circuit's reference to 42 U.S.C. §1988 is most noteworthy. That section, which in reality is a statutory codification of the

above-discussed long-established principle that statutes covering the same subject matter are to be construed consistently, reads as follows in applicable part:

"The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this chapter . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect. . . ."

In view of the above-stated principles of statutory construction, there is no validity to the arguments found at pages 11-13 of the Petition to the effect that the Ninth Circuit decision herein "has ramifications extending far beyond employment discrimination cases." (Petition p. 11.) This argument has no validity because under the principles of statutory construction outlined above and codified in 42 U.S.C. §1988, only that part of §1981 which also is covered by Title VII (i.e., employment contracts) would be affected by Title VII principles. Thus, unlike the situation in Washington v. Davis where basic and far-reaching Constitutional principles were being construed, in the instant case the fear does not exist that a whole range tax, welfare, and regulatory laws might be invalidated by the adoption of Title VII principles into §1981. In other words, to "conform" the two statutes as is required by §1988, all that need (or should) be done is incorporate the Griggs principle into §1981 employment discrimination cases, not into

other §1981 cases outside the employment sphere.

C. NO CIRCUIT HAS HELD THAT
PURPOSEFUL DISCRIMINATION
MUST BE PROVED IN EMPLOY-
MENT CASES BROUGHT UNDER
SECTION 1981

None of the Circuit Court cases cited by Defendants at Section "III" of their Petition stand for the proposition, as claimed by Defendants, that purposeful and intentional discrimination must be proved in an employment case brought pursuant to 42 U.S.C. §1981. In the remainder of the instant section Plaintiffs will analyze each of the cases cited by Defendants, on a case by case basis, and show that none of the cases are in conflict with the Ninth Circuit holding herein.

The Tenth Circuit in Chicano Police Officer Assn. v. Stover, 552 F.2d 918 (10th Cir. 1977) responded to the order of the United States Supreme Court in Stover v. Chicano Police Officers Assn., 426 U.S. 944 (1976), that vacated and remanded the case, by reconsidering its prior holdings in light of Washington v. Davis, 426 U.S. 229 (1976). This lawsuit was brought pursuant to 42 U.S.C. §§1981, 1983 and 1985. In its opinion, however, the Circuit Court discusses only the effect of Washington v. Davis on the "constitutional violations" under §§1983 and 1985 and completely fails to address the impact on the §1981 statutory violations. Hence, this case cannot be considered a ruling contrary to the instant case on the §1981

issue raised by Defendants.

Similarly, the decision of the Seventh Circuit in United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977), cert. denied, ___ U.S. ___, 54 L.Ed.2d 155 (1978) did not include a ruling under §1981. Despite the fact that the case was brought pursuant to Title VII, the Fourteenth Amendment and §§1981, 1983 and 1985 by various plaintiffs, the Circuit Court at Section "III" of its opinion considers the merits of the case only as to the violations of Title VII (Section "III. B.") and equal protection clause (Section "III. C."). 549 F.2d 425. Contrary to the assertion of Defendants herein (Petition, page 19), the Circuit Court reversed only the district court's holding concerning violations of the equal protection clause and failed to consider the liability standard to be applied to the §1981 causes of action.

The other Seventh Circuit case cited by Defendants, City of Milwaukee v. Saxbe, 546 F.2d 693 (7th Cir. 1976), also is not on point. Although the Circuit Court did rule that the plaintiff's §1981 claim required a showing of intentional discrimination, the lawsuit did not involve a claim of employment discrimination. Rather, the city brought this action against the United States Attorney General alleging discriminatory enforcement of the civil rights laws. Hence, the Seventh Circuit has not ruled on the issue herein as to the standard for liability to be applied in a §1981 employment discrimination case.

The Eighth Circuit case Johnson v. Alexander, ___ F.2d ___, 16 FEP Cases 894 (8th Cir. 1978)

similarly is not in conflict with the Ninth Circuit's ruling herein. The holding in Johnson v. Alexander did not involve an employment contract. In fact, the Eighth Circuit categorically stated that had an employment case been before it, a contrary holding would have resulted, since at 16 FEP Cases 897-98 n. 3 is found the following statement:

"The claim of the plaintiffs in Washington v. Davis was based solely on the fifth amendment; they did not invoke Title VII, and the Supreme Court recognized that the standards of Title VII may be broader than those of the amendment, invoked by plaintiffs 426 U.S. at 246-48. And, in a number of case it has been held that Title VII standards are applicable to suits brought by blacks under §1981." (Citations omitted; emphasis added.)

Plaintiffs further submit that a careful reading of the Eighth Circuit opinion in Johnson v. Alexander shows not only that that Court is in agreement with the holding of the Ninth Circuit herein, but also that the Eighth Circuit decision is premised entirely upon a finding that the case did not involve an employment situation.

Contrary to Defendants' contention at pages 17 and 18 of their Petition, the Sixth Circuit has not yet ruled on the §1981 issue. In Arnold v. Ballard, 16 FEP Cases 396, 12 EPD para. 11,224 (6th Cir. 1976) (not officially published), the Circuit Court merely vacated its previous decision and remanded the case to allow the district

court to consider initially the impact of Washington v. Davis on its findings. The district court has ruled on this issue but to date its decision has not been reviewed by the Sixth Circuit.

The Fifth Circuit in Harkless v. Sweeny Independent School District, 554 F.2d 1353 (5th Cir. 1977) was not presented with the issue of whether Title VII standards apply in §1981 actions. Nor did that court make any statements whatsoever concerning this issue. The facts of this case did not present a Griggs type violation requiring the adoption of Title VII standards in order to establish liability under §1981. Rather, the case involved a situation of blatant purposeful discrimination against black employees as compared to white employees and the Circuit Court held that the impact, historical background and sequence of events of the employer's actions established a case of intentional discrimination. Hence, the Fifth Circuit held only that a showing of purposeful discrimination was sufficient to establish a §1981 violation; there is no holding or implication that such a showing is required to establish a violation.

Defendants also cite the Fifth Circuit decision in Wade v. Mississippi Cooperative Extension Service, 528 F.2d 508 (5th Cir. 1976) as establishing the requirement that purposeful discrimination must be shown in §1981. The reality is that the holding in this case is precisely to the contrary. This case was filed in 1970 against a public employer challenging employment practices of the defendant as being in violation of the Fifth and Fourteenth Amendments, Title VI of the Civil Rights Act,

42 U.S.C. §§2000d, et seq. and 42 U.S.C. §§1981, 1983. Defendants no doubt rely on the Circuit Court's statement that it would not apply "Title VII guidelines" but rather that "public employment tests are to be judged under a constitutional standard in suits under 42 U.S.C. §§1981, 1983." 528 F.2d 518. In this statement, however, the Court is not discussing the prima facie case standard under §1981, but rather the burden on the defendant employer to show the job-relatedness of an employment practice already found to have an adverse impact. The Circuit Court held that the EEOC Guidelines were not the proper standard in a §1981 case. Defendants ignore the relevant holding of the Circuit Court at 528 F.2d 516-17 where it is stated: "It is, of course, beyond dispute that statistical evidence alone may enable the plaintiffs to satisfy their initial burden of showing discrimination."

D. ALL CIRCUITS WHICH HAVE
ADDRESSED THE SECTION
1981 ISSUE ARE IN ACCORD

As pointed out in the immediately preceeding sub-section, none of the Circuit cases cited by Defendants stand for the proposition, as asserted, that purposeful discrimination must be proved under §1981. There are, however, two Circuit Courts in addition to the Ninth Circuit which have addressed the issue. Both expressly agree with the Ninth Circuit that purposeful discrimination need not be proved in an employment discrimination case brought pursuant to §1981.

The Circuit Court for the District of Columbia was the first Circuit to rule directly on the point. In Kinsey v. First Regional Securities, Inc., 557 F.2d 830 (D.C. Cir. 1977), it is held as follows at 557 F.2d 838 n.22:

"In Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), the court held that a racially disproportionate impact is a violation of equal protection, however, only where a discriminatory purpose is shown. Since plaintiff-appellant here proceeds under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq. and 42 U.S.C. §1981, he need not meet this burden of proof. See League v. City of Santa Ana, 13 FEP Cases 1019 (C.D. Calif. 1976) and The Supreme Court, 1975 Term, 90 Harv. L. Rev. 58, 114-23 (1976) for discussion of the Washington v. Davis decision." (Emphasis added.)

The Fourth Circuit also directly addressed the point in Johnson v. Ryder Truck Lines, Inc., ___ F.2d ___ (4th Cir., May 2, 1978; No. 76-1293). Here the Court expressly held that all of the usual Title VII standards apply in cases brought pursuant to §1981.

E. ASSUMING ARGUENDO THAT INTENTIONAL DISCRIMINATION MUST BE PROVED IN THIS CASE, THERE IS OVERWHELMING EVIDENCE, INCLUDING ADMISSIONS OF RACIALLY DISCRIMINATION PURPOSE, IN THE RECORD BELOW.

At finding of fact number seven the Court below found that "Neither Defendants nor their officials engaged in employment practices with a wilful or conscious purpose of excluding blacks and Mexican-Americans from employment at the Los Angeles County Fire Department." 8 FEP Cases 239,241. It is noteworthy that the Court below made this finding in the belief that purposeful discrimination was irrelevant to the proceeding; indeed, at conclusion of law number six, the Court below noted that the only intent showing required was that the defendants had intentionally utilized the employment practices found to be illegal. 8 FEP Cases 242.

A finding of fact made under Rule 52 is "clearly erroneous" when, although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

Before analyzing the facts below, it should be noted that in Washington v. Davis, supra, at 242, this Court stated:

"Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact -- in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires -- may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." (Emphasis added.)

Very recently this Court elaborated upon Washington v. Davis and provided further guidance as to the circumstances in which the requisite discriminatory purpose may be inferred. Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977). Here it was held:

"Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislative or administrative body . . . made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. . . . When there is proof that a discriminatory purpose was a motivating factor in the decision . . .

judicial deference is no longer justified.

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. 265-66. (Footnotes omitted; emphasis added.)

In the instant case, the required analysis of the "totality of the relevant facts" and the "circumstantial and direct evidence of intent" begins with the fact that it was stipulated below that: (a) although approximately 10.3% of the general population of Los Angeles County is black, at the time this lawsuit was commenced only nine persons in defendants' workforce of 1,762, or 0.5%, were blacks (R. 136); (b) although 18.3% of the general population of Los Angeles County is Mexican-American, at the time this lawsuit was commenced only 50 persons in defendants' workforce, or 2.8%, were Mexican-Americans (R. 136); and (c) immediately after this lawsuit was commenced, but only because this lawsuit was commenced, defendants altered their hiring practices and established an eligibility list on which no less than 98 of the top 315 persons on the list were black and Mexican-American (R. 141; R. T. 48-49). The dearth of minority employees on the payroll at the time the lawsuit was brought, coupled with the sudden ability to hire substantial numbers of minorities after being sued in a class action, creates an "inference," plaintiffs submit, that the supposedly racially

neutral employment practices utilized before commencement of this lawsuit were not utilized in good faith or with a lack of racial intent but rather that those practices were used with a racially discriminatory purposeful intent.

But this Court need not rely on statistical and logical inferences in determining whether the Defendants engaged in purposeful or intentional discrimination prior to commencement of this action. Indeed, the evidence of purposeful discrimination below was so strong that "intentional" discrimination was admitted by Chief Barlow himself, the Chief of the Los Angeles Fire Department (R. T. 187-88).

Similarly conclusive evidence of blatant intentional or purposeful discrimination was found in the testimony of Harold McCann, a captain in the Los Angeles County Fire Department. He testified as to how programs designed to assist applicants were conducted exclusively for whites while similar programs with minority participants were prohibited by the Fire Department (R. T. 91-113).

Perhaps the most devastating evidence in the record below of intentional discrimination concerns the conceded fact that high officials in Defendants' personnel department admittedly knew that the written tests being utilized as part of the selection system for new firefighters operated to exclude blacks and Mexican-Americans, knew that these tests violated well-established Title VII legal principles, and nevertheless these

officials admittedly continued to utilize these tests as part of the selection process until they learned that this class action lawsuit was about to be commenced. The evidence below showing these facts is found at Plaintiffs' Exhibits seven, eight and nine, and at R. T. 48-49.

II

THE ISSUANCE OF THE REMEDIAL HIRING ORDER HEREIN WAS WITHIN THE JURISDICTION OF THE DISTRICT COURT

The second question presented by Defendants' Petition is whether the District Court exceeded its jurisdiction when it issued an affirmative action hiring order to remain in effect until such time as the percentage of minorities employed in the Los Angeles County Fire Department approximately equals the percentage of minorities in the general population of Los Angeles County. The District Court held that this prospective hiring order was "necessary to overcome the presently existing effects of past discrimination" as evidenced by the unrebutted prima facie case established by the severe under-utilization of minorities in Defendants' workforce. See Opinion below at 8 FEP Cases 239, 241-42.

In International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), this Court has recognized that a remedial hiring order,

virtually identical to the order herein, is appropriate relief where the plaintiffs have shown the existence of a pattern and practice of discrimination. At Section "III. A." of the Teamsters decision, 431 U.S. 361, this Court described the nature of appropriate "prospective relief" including at footnote 47 the injunctive relief afforded in that case, which at 431 U.S. 330-31 n. 4 was described as follows:

"The decree further provided that future job vacancies at any T. I. M. E. -D. C. terminal would be filled first '[b]y those persons who may be found by the court, if any, to be individual or class discriminatees suffering the present effects of past discrimination because of race or national origin prohibited by Title VII of the Civil Rights Act of 1964.' Any remaining vacancies could be filled by 'any other persons,' but the company obliged itself to hire one Negro or Spanish-surnamed person for every white person hired at any terminal until the percentage of minority workers at that terminal equalled the percentage of minority group members in the population of the metropolitan area surrounding the terminal."

Furthermore, as stated by the Ninth Circuit in its decision on rehearing in the instant case, "[e]ight Courts of Appeal, including this one, have considered and approved the use of accelerated hiring goals or quotas to eradicate

the effects of past discrimination." (Citations omitted.) 566 F.2d 1342. Hence, Defendants' Petition raised an issue that uniformly has been resolved by this Court and the Courts of Appeal in favor of the availability of prospective injunctive hiring relief.

The specific grounds for review set forth by Defendants do not distinguish the instant case from those in which remedial prospective hiring orders previously have been upheld. Defendants list three grounds as limiting the District Court's jurisdiction to order prospective relief herein: (1) the absence of a finding of intentional discrimination; (2) the fact that the discriminatory acts causing the present workforce/labor pool disparity took place prior to the effective date of Title VII and the applicable statute of limitations for §1981; and (3) a lack of standing due to the fact that the plaintiff class did not include past applicants who were affected by the past unlawful practices. (Petition, pages 2-3.)

A. A FINDING OF INTENTIONAL
DISCRIMINATION IS NOT
REQUIRED FOR A HIRING
ORDER UNDER §1981

Defendants' first argument raises in a different context the previously-discussed issue as to the proper standard for liability for violations based upon §1981. Defendants argue: (1) the acts causing the under utilization of minorities occurred before the date Title VII

became applicable to public employers; (2) hence, the entitlement to relief from the effects of these act must be based on violations of §1981; (3) a violation of §1981 requires a showing of intentional discrimination; (4) the District Court found no discriminatory intent; and (5) therefore, the pre-Title VII acts were not unlawful and Plaintiffs are not entitled to relief from their present effects.

Plaintiffs agree that the remedial hiring order herein was based upon a pattern and practice of discriminatory practices that were unlawful only under §1981, not Title VII. As discussed previously in this brief, however, §1981 does not require a showing of intentional discrimination (Section "I" above) and that even if it does, the District Court's gratuitous finding of no discriminatory intent is contrary to the facts in the Record and should be remanded (Section "I. E. ").

B. THE EXTENT OF A REMEDIAL
HIRING ORDER IS NOT LIMITED
BY THE STATUTE OF
LIMITATIONS

Defendants' second contention is that the remedial hiring order exceeds the District Court's jurisdiction because it provides relief for the present effects of hiring practices that occurred prior to the three year statute of limitation period applicable to §1981 actions. Defendants, however, do not come forward with any cases in which a prospective hiring order has been so limited. Indeed, in cases too numerous to cite, the Courts

have both explicitly and implicitly held that the statute of limitations does not affect the extent of prospective hiring relief. See e.g., the cases cited in the opinion below in the instant case at 566 F.2d 1342-43.

The basis for three rulings is the settled legal principle that when a "public right" is being enforced, the statute of limitations does not restrict the injunctive, non-monetary relief to be afforded. There is no conflict among the Circuits in employment discrimination cases that have ruled directly on this point. EEOC v. Occidental Life Insurance Co., 535 F.2d 533, 537-40 (9th Cir. 1976) aff'd on other grounds, 432 U.S. 355 (1977); EEOC v. Griffin Wheel, 511 F.2d 456, 458-59 (5th Cir. 1975); EEOC v. Kimberly Clark Corp., 511 F.2d 1352, 1359-60 (6th Cir. 1975). See also, EEOC v. Christiansburg Garment Co., Inc., 376 F.Supp. 1067, 1071-73 (W.D. Va. 1974); EEOC v. Duff Bros., Inc., 364 F.Supp. 405, 406-7 (E.D. Tenn. 1973); EEOC v. Eagle Iron Works, 367 F.Supp. 817, 823-24 (S.D. Iowa 1973); EEOC v. Laacke & Joys Co., 375 F.Supp. 852, 853 (E.D. Wis. 1974); EEOC v. Bell Helicopter Co., 426 F.Supp. 785, 790 (N.D. Tex. 1976). These cases explicitly distinguish between the "public rights" embodied in a prospective hiring order and the "private or individual rights" to backpay and retroactive seniority.

C. PLAINTIFFS HAVE STANDING TO SEEK A PROSPECTIVE HIRING ORDER RELIEF

Defendants' final ground for opposing the remedial hiring order is that the Plaintiffs lack standing to seek such an order, arguing that the individual named plaintiffs do not have standing to challenge the past hiring practices which caused the severe under-representation of minorities in the Defendants' workforce. Defendants base their argument on the Circuit Court's ruling that Plaintiff did not have standing to challenge a 1969 written test because the 'plaintiffs' class did not include any prior unsuccessful applicants." 566 F.2d 1337-38.

The failure to include past applicants in the plaintiff class is not a fatal defect depriving the District Court jurisdiction to awarding prospective hiring relief. In this regard, it is to be noted that: (1) the plaintiff class was defined by the Court below in terms of those persons entitled to injunctive relief as a result of Defendants' discriminatory hiring practices; (2) the named plaintiffs, who included current employees of the Los Angeles County Fire Department, had standing to seek a prospective hiring order; and (3) even if Plaintiffs do not currently have standing, on remand Plaintiffs should be allowed to remedy the mutual mistake of the Court and the parties by seeking a redefinition of the class to include past applicants.

Plaintiffs' first point is that it is irrelevant that the scope of the represented class as defined below did not include past applicants. In this lawsuit, the only relief sought by the Plaintiffs has been and is a hiring order designed to eliminate the effects of past discrimination. Plaintiffs did not seek individual back pay or seniority relief for identifiable past applicants. Hiring order relief, by its very nature, only can be prospective in nature. It was solely because the Plaintiffs sought prospective relief only, and not because the Plaintiffs did not challenge past practices affecting prior applicants, that the class certified below did not include past applicants. In other words, the parties and the court below, when they defined class, were focusing on the prospective relief sought by the Plaintiffs and therefore defined the class in terms of those entitled to relief. In this vein, it should be noted that the past applicants can and will benefit from the prospective relief at such time as they re-apply and thereby become future applicants.

In the alternative, three of the individual plaintiffs were and are minorities employed as firefighters by the County of Los Angeles. Three Circuit Courts have held that current employees of a defendant employer have standing as persons who are harmed by the underrepresentation of minorities in the workforce. Waters v. Heublein, Inc., 547 F.2d 466, 469-70 (9th Cir. 1976); Chicano Police Officer Assn. v. Stover, 526 F.2d 431, 435-37 (10th Cir. 1975); Gray v. Greyhound Lines, East, 545 F.2d 169, 175-76 (D.C. Cir. 1976)). Obviously, effective relief for the harm suffered by current employees

can be provided only by a prospective hiring order.

Finally, Plaintiffs' conduct of this case has consistently focused on Defendants' past hiring practices. The statement of the liability issue before the court below specifically goes to all employment practices, past and present. (R. 134.) The evidence below reflected this broadly stated liability issue. For example, in the Pre-Trial Conference Order, the overwhelming majority of stipulations of fact (R. 136-141) and "statements of material facts and relevant law" (R. 142-148) related to Defendants' past pattern and practice of discrimination in their hiring practices. Furthermore, the District Court's Finding of Facts and Conclusions of Law discusses and rules on the legality of Defendants' past hiring practices and specifically finds that the hiring order is "necessary to overcome the presently existing effects of past discrimination." 8 FEP Cases 239,241-42. Hence, this is not a case where the Plaintiffs have failed to challenge past employment practices.

Plaintiffs submit that if past applicants must be included in the plaintiff class in order for a prospective hiring order to be granted, the mutual mistake of the parties and the District Court that resulted in the failure to include past applicants in the class should not be fatal to the hiring order herein. Rather, this Court should either remand this case to the District Court for reconsideration

of the class definition or redefine the class on its own motion based on the facts in the Record.

III

CONCLUSION

For the reasons stated above, Plaintiffs respectfully submit that Defendants' Petition for Writ of Certiorari should be denied.

Dated: May 26, 1978.

Respectfully submitted,

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IN THE
Supreme Court of the United States

October Term, 1978
No. 77-1553

COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS
OF THE COUNTY OF LOS ANGELES; and CIVIL SERV-
ICE COMMISSION OF THE COUNTY OF LOS ANGELES,
Petitioners,

vs.

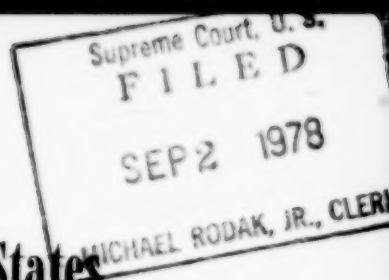
VAN DAVIS, HERSHEL CLADY and FRED VEGA, individu-
ally and on behalf of all others similarly situated, WILLIE C.
BURSEY, ELIJAH HARRIS, JAMES W. SMITH, WILLIAM
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LEON AUBRY, RONALD CRAWFORD, JAMES HEARD,
ALFRED R. BALTAZAR, OSBALDO A. AMPARAH, in-
dividually and on behalf of all others similarly situated,
Respondents.

**On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit.**

**BRIEF FOR COUNTY OF LOS ANGELES, et al.,
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IN THE Supreme Court of the United States

October Term, 1978
No. 77-1553

COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS
OF THE COUNTY OF LOS ANGELES; and CIVIL SERVICE
COMMISSION OF THE COUNTY OF LOS ANGELES,
Petitioners,

vs.

VAN DAVIS, HERSHEL CLADY and FRED VEGA, individually and on behalf of all others similarly situated, WILLIE C. BURSEY, ELIJAH HARRIS, JAMES W. SMITH, WILLIAM CLADY, STEPHEN HAYNES, JIMMIE ROY TUCKER, LEON AUBRY, RONALD CRAWFORD, JAMES HEARD, ALFRED R. BALTAZAR, OSBALDO A. AMPARAH, individually and on behalf of all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit.

**BRIEF FOR COUNTY OF LOS ANGELES, et al.,
PETITIONERS.**

Opinion and Judgment Below.

The opinion on rehearing (including dissent) of the United States Circuit Court of Appeals for the Ninth Circuit is reported as *Van Davis, et al. v. County of Los Angeles, et al.*, 566 F.2d 1334 (9th Cir. 1977). The original opinion of the circuit court is printed as Appendix F and reported as 13 FEP Cases 1217 (1976).

Jurisdiction.

The opinion and judgment were entered on December 14, 1977. A timely petition for rehearing was filed by the respondents, *Van Davis, et al.* (plaintiffs-appellants below), and was denied on January 30, 1978.

Jurisdiction of the district court was based on 28 U.S.C. Sec. 1343.

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1), and Rule 19(1)(b), and the Petition for Writ of Certiorari was granted on June 19, 1978.

Constitutional and Statutory Provisions Involved.

1. The 5th and 14th Amendments to the United States Constitution; in particular, the due process and equal protection clauses thereof;

2. The following provisions of the United States Code:

42 U.S.C. Sec. 1981. Equal rights under the law:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and extractions of every kind, and to no other.

42 U.S.C. Sec. 2000e, *et seq.* Title VII of the Civil Rights Act of 1964 as amended in 1972.

Questions Presented.

1. Is proof of purposeful racial discriminatory intent required to establish a cause of action for employment

discrimination under 42 U.S.C. Sec. 1981 or can an employer be held liable for pre-Title VII employment practices under Sec. 1981 merely by a showing of disproportionate impact?

2. Is the imposition of a racial quota hiring order effective until the entire fire department achieves current racial parity with the general Los Angeles County population beyond the jurisdiction of the court when:

a. The district court expressly found no discriminatory intent was present;

b. The quota hiring order attempts to remedy hiring practices occurring prior to the effective date of Title VII and time barred by the applicable 3-year Statute of Limitations on Sec. 1981 actions;

c. The respondents had no standing to represent any pre-March 24, 1972 applicants and no discriminatory hiring has occurred subsequent to Title VII's effective date;

d. The quota remedy exceeds the scope of the effects of any proven discriminatory hiring practices?

Statement of the Case.

In this proceeding, the County of Los Angeles by judgment entered on July 20, 1973 was found liable for employment discrimination under 42 U.S.C. Sec. 1981 and Title VII and ordered to engage in quota hiring of blacks and Mexican-Americans until the entire fire department numbering 1750 firefighters achieved racial parity with the County's general population. The following pivotal facts were established at trial:

1. It was conceded by respondents that no discriminatory hiring occurred after the effective date of Title VII (A. 5, 6).

2. The trial court found that the County had not, at any time, engaged in purposeful discrimination. To the contrary, the court expressly found that the County had engaged in efforts designed to increase minority representation in the fire department (A. 41).

3. None of the respondents except those already employed by the department had been applicants for any firefighter position prior to 1972. None of the named plaintiffs had been disqualified or adversely affected in the selection process by any of petitioners' written tests. The Ninth Circuit subsequently held that the plaintiffs lacked standing to challenge the County's use of qualification tests given at any time prior to 1972 (A. 83).

4. All respondent applicants taking the 1972 written exam passed, and all hiring from the resulting eligibility list was conceded by plaintiffs prior to trial to have been accomplished in a non-discriminatory manner.

The respondents in their complaint filed on January 11, 1973 challenged two written employment tests of the County of Los Angeles—one given in 1969 and the other in 1972. Only these two written employment tests administered by the County of Los Angeles are relevant or were in issue in this case. Both tests were civil service aptitude tests developed by Los Angeles County's Department of Personnel and administered to all applicants for entry level firemen during the two periods when applications for employment were being accepted.¹ While also claiming the 5'7" minimum

¹The appointment procedure also included a competitive oral interview, medical exam, physical strength and agility test and background check. None of these tests had a disproportionate impact on minorities and were not challenged as being discriminatory by the respondents.

height standard was discriminatory, the plaintiffs (respondents herein) expressly declined to seek an injunction against its use in both the District and Circuit Court. None of the plaintiffs was disqualified by the minimum height standard. In an amended complaint the plaintiffs conceded that the hiring as a result of the 1972 test was not discriminatory (A. 5, 6). Ultimately, the Ninth Circuit in the decision under review ruled that the plaintiffs had no standing to challenge the 1969 written tests.

Legal Proceedings.

In July, 1973, the trial court found that petitioner County of Los Angeles had violated 42 U.S.C. Secs. 1981, 1983, and Sec. 2000e-16 (Title VII) by administering a written employment qualification test for entry-level firefighter in 1969, and January, 1972, which had "a disproportionate impact on blacks and Mexican-Americans and not shown by a validation study to be predictive of job performance statistically" (A. 39).² The district court upheld the department's 5'7" minimum height standard. The court further found that neither the defendants nor their officials had engaged in any employment practices with a wilful or conscious purpose of excluding blacks and Mexican-Americans

²The only employment practices found by the district court to be discriminatory were, 1) the use of the two written tests having a disproportionate impact on blacks and Mexican-Americans and not shown by a validation study to be predictive of job performance statistically, and 2) the failure to cure a bad reputation in the minority community. The latter ground the circuit court did not consider sufficient to constitute a valid Title VII claim because it was extremely impressionistic and the district court did not rely on that theory. The only practices held by the circuit court as being discriminatory were the 1972 written test and the height requirement.

Davis v. County of Los Angeles, 13 FEP Cases 1217 at 1219 n.6.

from employment, but to the contrary, had engaged in efforts designed to increase minority representation in the Fire Department (A. 41). The district court also found that the petitioners did not interfere with affirmative action efforts of individual persons designed to increase black and Mexican-American participation rates in the Fire Department (A. 39).

As a remedy, the court ordered that the County hire all future entry level firemen in accordance with a hiring quota of 20% black and 20% Mexican-American until such time as the percentage representation of those minorities in the entire Fire Department in all ranks equaled their representation in the County's general population.

The only named plaintiffs in this case were individuals who were already employed as firefighters or who had applied for and taken only the 1972 written examination and were subsequently certified on a hiring list conceded by plaintiffs to have been administered and utilized in a non-discriminatory manner. No individual who had been unsuccessful on the 1969, or any prior exam, was a plaintiff, nor did the plaintiffs seek to represent such prior applicants, the complaint alleging that it was filed only on behalf of "blacks or Mexican-Americans" who are current or future applicants for employment as Los Angeles County Firemen (A. 3).

On appeal, the United States Court of Appeals for the Ninth Circuit, in its original decision, affirmed the judgment finding the County in violation of Sec. 1981. The court found that the plaintiffs failed to prove that specific discriminatory acts occurred during the effective period covered by Title VII because the tests administered in 1972 had not been implemented;

that is, no civil service list was promulgated or hires made as a consequence of the test results (A. 56, 57). Nevertheless, the court ruled that Title VII standards were applicable to Sec. 1981 claims and that a violation of Sec. 1981 could be established merely by showing that a hiring practice had a disparate effect on minorities and the employer was unable to validate the test as job-related. The circuit court reversed the trial court's judgment upholding petitioners' 5'7" minimum height standard and remanded for reconsideration of the quota.

Subsequent to its original decision, the Ninth Circuit, upon petitioners' request, granted a rehearing to determine, in light of this Court's recent decision in *Washington v. Davis*, 426 U.S. 229 (1976), whether proof of purposeful discriminatory intent is required for a violation of Sec. 1981. On rehearing, the Ninth Circuit (Judge Wallace dissenting) affirmed its original finding that there was no operational distinction between liability based upon Title VII and Sec. 1981 and that the adverse impact standards evolving from Title VII cases were sufficient to establish liability under Sec. 1981. It was held that a showing of deliberate intent to discriminate was not a requirement under Sec. 1981 as it was under the United States Constitution, as determined by this Court in *Washington v. Davis* (A. 89, 90).³ The Ninth Circuit, however,

³The majority opinion expressed their ruling in these terms: "In our view, there remains no operational distinction in this context between liability based upon Title VII and Sec. 1981. . . . "In summary, we believe the district court properly found defendants use of the 1972 written examination as a selection device to be a violation of Sec. 1981. Plaintiffs produced overwhelming statistical data to establish the test's disproportionate impact upon minority applicants, and the defendants were unable to validate the test in terms of job-relatedness" (A. 90, 91).

did rule that respondents lacked standing to represent prior unsuccessful applicants including those taking the 1969 test because the class did not include any prior unsuccessful applicants. *Van Davis, et al. v. County of Los Angeles, et al.*, 566 F.2d 1334 at 1338 (A. 83).

Judge Wallace dissented, being of the opinion that constitutional standards were applicable to proving discrimination under Sec. 1981 and noting that, even if it were otherwise, the quota hiring order was excessive as well as improper in view of the court's finding that respondents lacked standing to represent former applicants.

Hiring Practices.

The written civil service test challenged in this litigation was administered to applicants for entry-level firefighter positions twice, once in 1969 and again in January, 1972. The oral interview and physical agility portions of the examination process were not attacked because they had no disproportionate impact on minorities. Implementation of the 1972 administered test was delayed pending litigation in the state courts and when finally utilized for hiring purposes in 1973, was used only on a pass-fail basis with 97% of all applicants passing. As to these passing applicants, their subsequent oral interviews and physical examinations had no adverse impact.

The County of Los Angeles hired no firemen from well before March 24, 1972 (the effective date of Title VII) until the Spring of 1973, when the first recruit class was composed 50% of minorities (10

blacks and 20 Mexican-Americans.)⁴ All subsequent hiring has been pursuant to the trial court's 40% preferential minority hiring order of July, 1973. At no time was there any claim made that there had been discriminatory hiring since March 24, 1972, or as a consequence of the 1972 written test.

It was established at trial in June, 1973 that the 1969 written exam as utilized in the hiring of new firefighters had a disproportionate impact on blacks and Mexican-Americans. The County, however, in the administration of the subsequent 1972 exam, set the cut off score extremely low so that 97% of the applicants passed, and then intended to process through the oral interview and physical agility phases of the selection process approximately 500 of those applicants. These 500 would be chosen totally by random selection so that the minority applicant percentage which approximated their community representation would be maintained throughout the subsequent stages of the selection process which had shown no history of disproportionate racial impact (A. 23, 24).

A state lawsuit alleging that the proposed random selection method violated the civil service law resulted in its use being enjoined. After a year's delay, the County, because of the urgent need for new firemen, initially contemplated interviewing the top 544 applicants on the 1972 written test. No such selection or interviews were ever commenced. Instead, all passing applicants were interviewed and hires were made in a non-discriminatory manner (A. 5, 6, 25).

⁴The respondents, in their first and second amended complaints, alleged that the hiring of this recruit class was done in a non-discriminatory manner (A. 5, 6).

During the five-year pendency of the appeal, the petitioners observed, and in most cases exceeded the terms of the quota hiring order, and as of July, 1978, had hired as firemen recruits 373 persons of which 207 (55.5%) were blacks or Mexican-Americans. Pursuant to the terms of the judgment the district court receives annual reports and retains jurisdiction over the case until the entire department reaches community racial parity.

Summary of Argument.

The judgment herein holding the petitioner liable for pre-Title VII (March 24, 1972) employment practices is challenged on two primary grounds:

1) Purposeful discriminatory intent is required to establish a violation of 42 U.S.C. Sec. 1981. This the respondents failed to do as the trial court expressly found no intentional discrimination in regard to any of petitioners' employment practices.

2) The quota hiring order was beyond the District Court's jurisdiction as it clearly exceeds the scope of the violations and illegally strives to achieve racial balance rather than remedy the effects of proven discrimination occurring within the actionable 3-year Statute of Limitations period. Moreover, the respondents (none of whom had been discriminatorily denied employment) lacked standing to represent prior applicants who were objects of the remedial order.

The petitioners made no hires in a discriminatory manner or with any disproportionate effect subsequent to the effective date of Title VII, nor in any way engaged in a pattern or practice of discrimination.

42 U.S.C. Sec. 1981, enacted originally as part of the Civil Rights Act of 1866 and reenacted as part of the Civil Rights Act of 1870, is a statute separate and distinct from Title VII and is neither co-extensive in coverage or in the standards for measuring an actionable claim. Section 1981 is an equal protection statute similar to Sec. 1983, enacted to protect constitutional rights in accordance with the congressional intent to prohibit deliberate discrimination. The more stringent presumptions, standards, and burdens of proof unique to Title VII are not applicable to claims under Sec. 1981 as the Supreme Court has held them not to be applicable to the Fourteenth Amendment and Sec. 1983 in *Washington v. Davis*, 426 U.S. 229 (1976).

A decision that constitutional standards (purposeful intent) govern the proof of a cause of action under Sec. 1981 will comport with its legislative history, its application in related discrimination cases, and will harmonize that statute with parallel interpretations of Secs. 1982, 1983, 1985, and the U.S. Constitution. Moreover, such an interpretation is necessary to avoid the harm attendant to Title VII enforcement procedures if Sec. 1981 discrimination standards are held to be operationally the same as Title VII's.

Extending Title VII standards to Sec. 1981 causes of action will necessarily create conceptual confusion in all forms of non-employment discrimination actions under Sec. 1981. To a great extent the effect of the Court's ruling in *Washington v. Davis* will be negated by the simple expedient of alleging a cause of action under Sec. 1981. Moreover, the circuit court's decision will permit circumvention of the Title VII's administrative, conciliatory, and procedural prerequisites. The

latter consequence, because of differing statutes of limitation among the jurisdictions, would destroy the enforcement uniformity of Title VII and expose the federal courts to a flood of litigation on claims that Congress intended should be first winnowed through the EEOC conciliation machinery. The circuit court's decision effectively vitiates the clear distinction this Court has made between proof and liability for pre- and post-Title VII employment practices and makes Title VII retroactive to government agencies.

Although liability and the quota hiring order have been predicated upon a violation of Sec. 1981, it is likewise clear that there has been no violation of Title VII. All hires by the petitioners subsequent to the effective date of Title VII have been non-discriminatory, without disproportionate effect, and in compliance with the Court's quota hiring order. Under the facts of the case, there is absolutely no basis for a finding of Title VII violation and certainly there is no factual justification for the wide-ranging quota hiring order imposed.

Although the focus of the argument has been directed to the Sec. 1981 issue, the nature of the remedy imposed has far-reaching consequences and is subject to serious challenge. The trial court's hiring order requiring 40% minority hiring per annum until the entire fire department achieves racial parity with the general county population is in excess of the court's jurisdiction and violates Sec. 703(j) of Title VII. The respondents have concurred that the remedial hiring order herein was based upon a pattern and practice of discriminatory practices that were unlawful only under Sec. 1981, not Title VII (Opposition 29). As such, of course,

the quota order is totally unrelated to the extent of any proven violation, seeks to provide a remedy to a class the court of appeals has held the respondents have no standing to represent, and attempts to remedy speculative unproven discrimination that could have only taken place, if at all, more than three years preceding the filing of the action and thus time barred under the applicable statute of limitations.

ARGUMENT.

I

CONSTITUTIONAL, NOT TITLE VII, STANDARDS OF DISCRIMINATION GOVERN CLAIMS UNDER 42 U.S.C. SEC. 1981; PURPOSEFUL DISCRIMINATION IS THE CORRECT CRITERION FOR ADJUDGING A VIOLATION OF SEC. 1981.

A. Section 1981 Is a Separate and Distinct Equal Protection Statute Whose Standards of Liability Should Track Constitutional Principles, Not Those of Title VII.

The circuit court's holding that there remains no operational distinction between liability based upon Title VII and Sec. 1981 ignores Sec. 1981's constitutional heritage and embarks the federal courts on a journey that is completely divergent from the historical foundations of the Civil Rights Acts of 1866 and 1870.

One begins with the observation that Sec. 1981 and Title VII are separate, distinct and independent statutes affording different, albeit to some extent related, rights and remedies. The independent nature of the two statutes, enacted more than ninety years apart, was firmly established by the Court in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

In *Johnson*, the Court had occasion to decide whether the filing of an EEOC charge pursuant to Title VII tolled the statute of limitations applicable to an action on the same facts under Sec. 1981. The Court, in concluding that it did not and that the plaintiff was barred from pursuing his claim under Sec. 1981 stated that,

"Sec. 1981 is not coextensive in its coverage with Title VII",

and commented further,

". . . that the remedies available under Title VII and Sec. 1981, although related and although directed to most of the same ends, are separate, distinct, and independent . . ."

Johnson v. Railway Express Agency, Inc., *supra* at 460, 461.

In an earlier case, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186 (1968), the Supreme Court noted the independent nature of the Reconstruction Era Civil Rights Statutes and the recently enacted Civil Rights Act of 1968. Title VIII of the Civil Rights Act of 1968, similar to Title VII of the Civil Rights Act of 1964, prohibited discrimination in a defined area of congressional concern and provided comprehensive administrative machinery for the enforcement of open and non-discriminatory housing. The Supreme Court found that statute to be quite different from its 100-year-old predecessor in 42 U.S.C. Sec. 1982 stating,

"Later the same day, the House passed the Civil Rights Act of 1968. Its enactment had no effect upon Sec. 1982 and no effect upon this litigation, but it underscored the vast differences between, on the one hand, a general statute applicable only to racial discrimination in the rental and sale of property and enforceable only by private parties acting on their own initiative, and, on the other hand, a detailed housing law, applicable to a broad range of discriminatory practices and

enforceable by a complete arsenal of federal authority.”

Jones v. Alfred H. Mayer Co., *supra* at 2191.

Although *Jones* involved Sec. 1982, a companion to Sec. 1981 in the Civil Rights Act of 1870, the Court’s analysis of that statute in the context of the recently enacted Title VIII of the Civil Rights Act of 1968 is extremely illuminating. In addition to recognizing the independent nature of the two statutes, the Court found that the passage of the modern law had no effect upon Sec. 1982—a view similar to the one urged by the petitioners herein—that Title VII of the 1964 Civil Rights Act was not intended to, and, in fact, did not have any effect on Sec. 1981.

Evidence in the *Congressional Record* could not make it more clear that Congress in enacting Title VII in 1964 and amending it in 1972, intended Title VII to provide an additional, independent cause of action and in no way to affect Secs. 1981, 1983:

“In establishing the applicability of Title VII to state and local employees, the Committee wishes to emphasize that the individual’s right to file a civil action in his own behalf, pursuant to the Civil Rights Act of 1870 and 1871, 42 U.S.C. Secs. 1981 and 1983, is in no way affected”

“Title VII was envisioned as an independent statutory authority meant to provide an aggrieved individual with an additional remedy to redress employment discrimination”

U.S. Cong. & Adm. News ’72, p. 2154.

In debating whether to repeal Sec. 1981 and to make Title VII the exclusive discrimination remedy

in 1972, it was stated by Senator Williams in support of retaining Sec. 1981 that:

“This is especially true where the legal issues under other laws may not fall within the scope of Title VII or where the employee, employer, or labor organization does not fall within the jurisdictional confines of Title VII. These situations do exist, and I am sure that it is unnecessary to spell them out at this point.”

1972 Senate *Congressional Record*, p. 3372.

While both the Supreme Court and Congress have observed that Sec. 1981 and Title VII are separate and distinct statutes providing independent avenues for relief, it has been remarked that the remedies are, to a certain extent, coextensive and that the two statutes augment each other and are not mutually exclusive. This is correct, of course, to the same extent as can be said about any number of laws that deal in general with the same subject matter. This does not mean that the same standard of liability pertains to each statute and that purposeful intent is not a necessary element to a Sec. 1981 claim.

The remedies available under Sec. 1981 and Title VII are very similar and both statutes provide a cause of action for discrimination in employment, including that of a *deliberate* character. This overlap of remedies and jurisdiction in the instance of deliberate discrimination cannot be taken as a basis for concluding that the proof of discrimination is the same in all cases under the two independent statutes and that Sec. 1981 prohibits unintentional discrimination upon proof that a neutral hiring practice had a disproportionate impact.

Since Title VII and Sec. 1981 are clearly independent statutes, and the petitioners’ liability was predicated

on the latter, the inquiry must focus on what is the standard of liability under Sec. 1981 as intended by Congress in the post-Civil War period.

1. Section 1981 Was Enacted as an Equal Protection Statute Intended to Enforce Constitutional Rights.

Section 1981 is a post-Civil War Reconstruction Era statute originally enacted in 1866 to enforce the 13th Amendment to the United States Constitution which prohibits involuntary servitude, and extends to others the same right to make and enforce contracts enjoyed by white citizens—that is, equal rights under the laws. Section 1981 was subsequently reenacted as part of the Civil Rights Act of 1870, which was designed to implement the 14th Amendment. Clearly, Sec. 1981, enacted as part of the Civil Rights Act of 1866, rested only on the 13th Amendment as the 14th Amendment had not been formally proposed at the time. The Civil Rights Act of 1870, however, is based upon the 14th Amendment and it reenacted, with minor changes, certain language of Sec. 1981, as it appeared in the 1866 Act.

In determining whether Sec. 1981 is based solely on the 13th or 14th Amendment, the problem is compounded by the reenactment of Secs. 1981 and 1983 together in the recodification in 1874. The most recent Supreme Court view appears to be that Sec. 1981 finds its roots in *both* the 13th and 14th Amendments.

While the true constitutional antecedents of Secs. 1981 and 1983 may make for an interesting excursion into the realm of legislative genealogy, its resolution is not determinative of the predominant issue of this case; *i.e.*, whether Title VII or constitutional standards of liability pertain. It is clear that Sec. 1981 is based

upon a constitutional right which the Court has found is traceable, in substantial part, to the 14th Amendment. Even assuming Sec. 1981 to be predicated solely on the 13th Amendment, the standard of liability is still purposeful racial discrimination.

The broader equal protection principles applicable to all races from Sec. 1981 has been recently emphasized by this Court despite its partial heritage from the 13th Amendment. *McDonnell v. Santa Fe Trail Transportation Co.*, 427 U.S. 327, 96 S.Ct. 2574 (1976); *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586 (1976). In this context, an argument that constitutional distinctions in the origins of Secs. 1983 and 1981, in and of themselves, require rejection of the *Washington v. Davis* rule when applied to local government action challenged under Sec. 1981, lacks persuasion. Standards for actionable discrimination under the two statutes should be harmonized, rather than distinguished, a concept noted by this Court in *Runyon v. McCrary*, *supra*. Section 1981 prohibits racial distinctions in the terms of, or in the right to make, a contract. It does not incorporate the subtleties and rigorous standards relating to adverse impact and test validation that have evolved with the passage of Title VII and its subsequent interpretation by the courts and administrative agencies. If the employer deliberately discriminates in making an employment contract based on race, or specifies different terms and conditions thereof based solely on race, then those statutes as well as the United States Constitution have been violated.

“One of the ‘rights enumerated’ in Sec. 1 is ‘the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens’ 14 Stat. 27. Just as in *Jones a Negro’s* Sec. 1 right to

purchase property on equal terms with whites was violated when a private person refused to sell to the prospective purchaser solely because he was a Negro, so also a Negro's Sec. 1 right to 'make and enforce contracts' is violated if a private offerer refuses to extend a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees."

Runyon v. McCrary, *supra* at 2594.

This exclusion based on race alone is clearly not what occurred in the instant case or in *Washington v. Davis*. In both instances, the same civil service developed test was administered to all races and the same grading and scoring standards for determination of eligibility for appointment were applied equally and consistently to all races. The respondents have predicated their entire case solely upon a showing of disproportionate impact and a claim that the defendants cannot prove by a validation study that their tests are related to, or predictive of, job performance statistically—evidentiary principles that have evolved *solely* from Title VII decisions.

The Supreme Court has previously held that discriminatory intent is required under 42 U.S.C. Secs. 1982, 1983 and 1985(3). Section 1981 should be construed accordingly. In *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431, 93 S.Ct. 1090 (1973), *supra*, the Court stated that Secs. 1981 and 1982 should be construed together in light of their historical relationship. Noting the independence of Title VIII from Sec. 1982, the Court in *Jones v. Alfred Mayer Co.*, went on to interpret Sec. 1982, itself, to determine if it prohibited private as well as public discrimination. The

present language of Sec. 1982 is remarkably similar in its broad scope to that of Sec. 1981 since both find their genesis in Sec. 1 of the 1866 Civil Rights Act. As the Court described the statute in *Jones*, *supra* at 2193,

"... [i]n plain and unambiguous terms Sec. 1982 grants to all citizens, without regard to race or color, the same right to purchase or lease property as is enjoyed by white citizens."

The present language of Sec. 1981 was originally part of Sec. 1 of the 1866 Civil Rights Act which provided:

"... citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, * * * shall have the same right, in every State and Territory in the United States, *to make and enforce contracts*, to sue, be parties, and give evidence, *to inherit, purchase, lease, sell, hold, and convey real and personal property*, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." (Emphasis added).

In later codifications, the language pertaining to the right to make and enforce contracts was retained in Sec. 1981, and the language relating to the right to purchase, lease and convey real or personal property was transposed to a new section enumerated as Sec. 1982. In interpreting what the present language of Sec. 1982 was intended to prohibit, the Court stated:

"Hence the structure of the 1866 Act, as well as its language, points to the conclusion urged

by the petitioners in this case—that Sec. 1 was meant to prohibit all racially *motivated* deprivations of the rights enumerated in the statute. . . .” (Emphasis added).

Jones v. Alfred H. Mayer Co., *supra* at 2196.

Two statutes enacted at the same time, sharing the same congressional goals and the same Civil Rights Act, and utilizing essentially the same language, particularly the operative phrases under which certain forms of discrimination are actionable; to wit, “to make and enforce contracts,” and “to . . . purchase, lease, sell . . . and convey real and personal property” must be considered *in pari materia* and construed accordingly. The parity of construction between Secs. 1981 and 1982 is further supported by the Supreme Court’s finding in *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431, 93 S.Ct. 1090 (a case involving an express racial exclusionary policy), that:

“In light of the historical interrelationship between Sec. 1981 and Sec. 1982, there is no reason to construe these sections differently when applied on these facts to the claim of *Wheaton-Haven* that it is a private club.”

Tillman v. Wheaton-Haven Recreation Assn., *supra* at 172.

Additional support for the conclusion that Sec. 1981 is an equal protection constitutionally based statute requiring proof of discriminatory intent is provided by this Court’s decision interpreting Sec. 1985(3), enacted as part of the 1871 Act, in *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790 (1971). In *Griffin*, the Court held that Sec. 1985(3) was premised on the 13th Amendment and that a required element of a

cause of action under that statute was invidious discriminatory intent:

“The constitutional shoals that would be in the path of interpreting Sec. 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. See the remarks of Representatives Willard and Shellabarger, quoted *supra*, at 1797. The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.”

2. Congressional Intent in the Enactment of Section 1981 Was to Prohibit Unconstitutional, Purposeful Discrimination, Not to Create Liability Based on Disproportionate Impact.

The discrimination addressed by Congress at time of enactment of Sec. 1981 was intentional, not consequential. The adverse impact theory did not evolve until the EEOC Guidelines of 1970 and the interpretive *Griggs* decision of 1971. Although serious doubt exists as to whether Congress even intended adverse impact standards without considerations of intent to apply to Title VII, particularly in regard to public employers (see Seelman, *Employment Testing Law*; 10 Urban Lawyer 1, 49, 59, n 206); it is clear the *Griggs* doctrine evolved solely in conjunction with Title VII.

One cannot avoid noting the inequity of holding the County of Los Angeles liable for pre-1971 hiring practices under a standard that did not emerge until 1971. The disproportionate impact criterion is a creature of contemporary development, not mentioned by Congress in 1964, or expressly provided for in Title VII. In fact, prior to the issuance of the 1970 EEOC Guidelines, that agency had not adopted adverse impact as an indicium of prohibited racial discrimination.

It is difficult to envision how an agency without the power to issue regulations having the force and effect of law in regard to the statute which created it (*Gilbert v. General Electric*, 429 U.S. 125 (1976)), can change the standards of liability under a statute predating it by 100 years and with regard to which they have no regulatory relationship. Changes in a federal agency position on testing principles indicate the uncertain nature of employment discrimination concepts even in the context of Title VII. The civil service procedures developed in the late 19th and early 20th centuries to promote merit hiring in public employment, such as the Federal Service Entrance Examination at issue in *Washington v. Davis* and those developed nationally by state and local entities, were considered models of public administration. It is inconceivable that Congress in 1866 could have intended these to constitute a violation of Sec. 1981 absent racial motivation in their use. What constitutes a proper testing technique remains a matter of intense controversy (see

Brief of APA, Division 14, in *Washington v. Davis*). Whether an employer has violated an 1866 civil rights statute should not turn upon psychological testing standards in contemporary vogue.

B. Extension of Griggs Doctrine to Section 1981 Is Inconsistent With Established Standards of Liability in Non-employment Civil Rights Actions.

In addition to disagreeing with the application of the *Griggs* standard in previous employment discrimination cases under Secs. 1981 and 1983, this Court in *Washington v. Davis*, *supra* at 240, 2047, expressly ruled it inapplicable to constitutional discrimination claims in other contexts. The Court in *Washington* stated, *supra* at 2051,

“A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.”

The concern noted above will become a reality if the contract clause in Sec. 1981 is interpreted and applied in conjunction with the *Griggs* doctrine. For example, the Court in *Jones v. Alfred H. Mayer Co.*, *supra*, construed Sec. 1982 which prohibits discrimination in the sale and purchase of real property as being directed against racially motivated practices. However, the right to purchase or sell real property is

exercised contractually. If disproportionate impact is insufficient for liability under Sec. 1982, then a claimant in a non-employment context need simply plead his case under Sec. 1981 and thus invalidate the challenged property related practice simply on the ground it is more burdensome to minorities.

Racial discrimination claims not involving employment have been and will continue to be brought under Sec. 1981 as well as Sec. 1983 and the Constitution. There is nothing in the legislative history of Sec. 1981 which suggests that liability thereunder is to be premised merely upon a showing of disproportionate impact or that employment cases are to be accorded special treatment and be subject to different standards of proof than other civil rights claims encompassed by that statute. The Circuit Court's holding herein, necessarily undermines the thrust of the *Washington* decision and invites confusion and error as to the correct standard for proving discrimination in future nonemployment cases under Sec. 1981.

Sec. 1981, as noted earlier, broadly protects the right of all persons in the United States to make and enforce contracts and to have the full and equal benefit of all laws. Discrimination actions alleging a violation of that statute have been prosecuted against a wide variety of public and private actions in which the courts have uniformly applied the constitutional deliberate intent standard, a fact emphasized by this Court in *Washington*. Recent examples are:

Runyon v. McCrary, *supra*, (denial of admission to publicly advertised private schools solely because of race); *Hills v. Gautreaux*, (1976) 425 U.S. 284 [96 S.Ct. 1538] (discriminatory housing

practices that selected sites to intentionally avoid placing blacks in white neighborhoods); *Jennings v. Paterson*, (5th Cir. 1974) 488 F.2d 436 (construction of road barricade to deliberately bar access to blacks); *Olzman v. Lake Hills Swim Club, Inc.*, (2nd Cir. 1974) 495 F.2d 1333 (racially motivated swim club exclusory policy); *Bell v. Southwell*, (5th Cir. 1967) 376 F.2d 659 (segregated voting lists and booths).

In each case where liability was established it was predicated upon evidence of deliberate intent, not a neutral practice that in operation had a racially disproportionate impact. The suggestion that racial impact standing alone should now be the standard for liability appears rejected by the majority in *Washington* when the Court stated:

"Both before and after *Palmer v. Thompson*, however, various Courts of Appeals have held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications. The cases impressively demonstrate that there is another side to the issue; but, with all due respect, to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement." (Emphasis added).

Washington v. Davis, *supra* at 246, 2050.

In footnote 12, *Washington v. Davis*, *supra* at 2050, the Court listed the numerous cases with which they disagreed including a substantial number dealing with public employment.⁵ Many of these cases in both the employment and non-employment contexts were brought under Sec. 1981 as well as Sec. 1983. Notable examples are:

Chance v. Board of Examiners, 458 F.2d 1167, 1176-1177 (CA2 1972); *Bridgeport Guardians v. Bridgeport Civil Service Comm'n.*, 482 F.2d 1333, 1337 (CA2 1973); *Castro v. Beecher*, 459 F.2d 725, 732-733 (CA1 1972); *Arnold*

⁵Cases dealing with public employment include *Chance v. Board of Examiners*, 458 F.2d 1167, 1176-1177 (CA2 1972); *Castro v. Beecher*, 459 F.2d 725, 732-733 (CA1 1972); *Bridgeport Guardian v. Bridgeport Civil Service Comm'n.*, 482 F.2d 1333, 1337 (CA2 1973); *Harper v. Mayor of Baltimore*, 359 F.Supp. 1187, 1200 (D.Md.), *aff'd in pertinent part sub nom.*; *Harper v. Kloster*, 486 F.2d 1134 (CA4 1973); *Douglas v. Hampton*, 168 U.S.App.D.C. 62, 67, 512 F.2d 976, 981 (1975); but cf. *Tyler v. Vickery*, 517 F.2d 1089, 1096-1097 (CA5 1975), cert. pending, No. 75-1026. There are also District Court cases: *Wade v. Mississippi Cooperative Extension Serv.*, 372 F.Supp. 126, 143 (ND Miss. 1974); *Arnold v. Ballard*, 390 F.Supp. 723, 736, 737 (N.D. Ohio 1975); *United States v. City of Chicago*, 385 F.Supp. 543, 553 (N.D. Ill. 1974); *Fowler v. Schwarzwald*, 351 F.Supp. 721, 724 (D. Minn. 1972), *rev'd on other grounds*, 498 F.2d 143 (CA8 1974).

In other contexts there are *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (CA2 1968) (urban renewal); *Kennedy Park Homes Assn. v. City of Lackawanna*, 436 F.2d 108, 114 (CA2 1970), cert. denied, 401 U.S. 1010, 91 S.Ct. 1256, 28 L.Ed.2d 546 (1971) (zoning); *Southern Alameda Spanish Speaking Organization v. Union City*, 424 F.2d 291 (CA9 1970) (dictum) (zoning); *Metropolitan H. D. Corp. v. Village of Arlington Heights*, 517 F.2d 409 (CA7), cert. granted, December 15, 1975, 423 U.S. 1030, 96 S.Ct. 560, 46 L.Ed.2d 404 (1975) (zoning); *Gautreaux v. Romney*, 448 F.2d 731, 738 (CA7 1971) (dictum) (public housing); *Crow v. Brown*, 332 F.Supp. 382, 391 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (CA5 1972) (public housing); *Hawkins v. Town of Shaw*, 437 F.2d 1286 (CA5 1971), *aff'd on rehearing en banc*, 461 F.2d 1171 (1972) (municipal services).

v. Ballard, 390 F.Supp. 723, 736, 737 (N.D. Ohio 1975).

Of particular interest is the fact that the district court in *Arnold v. Ballard* upon remand subsequent to *Washington v. Davis* held that discriminatory intent is required under §1981 and expressly disagreed with the majority opinion in the instant case. (U.S.D.C. N.D. Ohio, C73-478, March 14, 1978).

The respondents' Opposition to the Petition for Certiorari reveals that they do not contend that the *Griggs* standards should be transposed to nonemployment Sec. 1981 actions. Instead, they posit the theory that employment cases are a special class within Sec. 1981 to which a different standard for adjudicating illegal discrimination is applicable. There is, however, no justification in either the legislative history or judicial interpretations of that section for such an expansive broad contention. It is inconceivable that in 1866 the Members of Congress had in mind the *Griggs* doctrine, or that they possessed a unique concern for employment practices out of the many others that would affect the recently emancipated blacks. Applying *Griggs* standards only to employment cases under Sec. 1981 is a form of statutory surgery contrary to the will of Congress.

It is clear that Sec. 1981 does not speak separately as to employment practices, but refers to the making of *all* contracts and the full and equal benefit of *all* laws. Recognizing that Sec. 1981 on its face does not provide for different considerations in employment cases, the argument is advanced that Congress in enacting Title VII intended to modify Sec. 1981 *only as to employment discrimination claims*, and, thereby, borrow the *Griggs* standard.

This effort at statutory reconstruction, while novel, simply does not comport with the facts, the legislative history or any judicial interpretation. There is, indeed, a great deal of evidence that Congress in enacting Title VII did not intend to eliminate purposeful intent as an element of proof. Nevertheless, it is clear that Title VII did not affect previously enacted civil rights laws any more than Title VIII of the 1968 Civil Rights Act affected Sec. 1982, (see *Jones v. Alfred H. Mayer, supra*).

C. The Federal Civil Rights Acts of 1866, 1870, 1871 and the Constitution Should Be Harmonized by a Consistent Standard for Determining Illegal Discrimination.

The various statutes comprising the CRA of 1866 and 1871 should be construed consistently in regard to the standard of liability. As this and other related cases demonstrate, there is a need to harmonize Sec. 1981 with the liability standards under Secs. 1982, 1983 and 1985(3), as well as the United States Constitution. All of these statutes as well as the 13th and 14th Amendments were enacted during the same historical period in the form of equal protection legislation. Discriminatory intent is the established standard under the Constitution and in employment discrimination cases under Sec. 1983; likewise, it is a required element of proof under Sec. 1982 (*Jones v. Mayer*) and 1985(3) (*Griffin v. Breckenridge*). The same principle pertains to Sec. 1981.

Neither legislative nor judicial precedent justifies a different treatment of Sec. 1981 in general, and certainly not in the limited area of employment. It is the Constitution and the Reconstruction Era Civil

Rights Acts that require harmonizing—not those statutes and Title VII.

Besides being off the point, any theory that suggests that Title VII and Sec. 1981 should be harmonized by transposing Title VII standards of liability suffers from ignorance of the legislative history, antecedents, and purpose of each statute, as well as this Court's determination that the statutes are distinct and independent. It is simply wrong to believe that the statutes can be truly "harmonized" at all in this fashion. Rather than harmonize, a holding that the standards of proof and liability under Sec. 1981 are operationally the same, inevitably does violence to the procedures, goals, rights and liabilities that Congress intended to establish through the enactment of Title VII.

The Supreme Court in *Washington v. Davis* observed the differences between the modern Title VII and the 14th Amendment. This distinction should continue to be maintained by determining that outside of Title VII, or some other statute that may specifically impose a *Griggs* standard, the uniform liability standard for employment discrimination is one of racial motivation and discriminatory intent.

II

THE DECISION IS CONTRARY TO THE SUPREME COURT'S RULINGS IN WASHINGTON V. DAVIS AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS V. UNITED STATES.

A. The Decision Unjustifiably Ignores the Purposeful Intent Holding in *Washington v. Davis*.

In *Washington v. Davis, supra*, this Court ruled that the standard for adjudicating claims of racial discrimination under Title VII was not the same standard

for adjudicating such claims under the Constitution. Although the complaint in *Washington* alleged a cause of action under Sec. 1981 as well as the Constitution, the Court did not specifically refer to Sec. 1981 in its opinion. The rationale behind the Court's decision, however, would appear equally applicable to actions under Sec. 1981 because the statute, like Sec. 1983, was intended to provide statutory protection to constitutional rights and while originating in the Civil Rights Act of 1866, was reenacted with Sec. 1983 as part of the Civil Rights Act of 1874.

The majority of the Circuit and District Courts⁶ have read the *Washington v. Davis* intent rule as encompassing both Secs. 1981 and 1983 claims, construing both of the statutes to be governed by constitutional principles. In light of the legislative history of these two statutes and the thrust of this Court's decision in *Washington*, the correct view appears to be that expressed after remand by the Tenth Circuit in *Chicano Police Officer's Association v. Stover*, 552 F.2d 918 (1977), echoed by numerous federal courts:

⁶*Chicago Police Officers Assn. v. Stover*, 552 F.2d 918 (10th Cir., 1977); *Arnold v. Ballard*, 12 EPD ¶ 11, 224 (1976); *United States v. City of Chicago*, 549 F.2d 415 (7th Cir., 1977); *City of Milwaukee v. Saxbe*, 546 F.2d 693, 705 (7th Cir. 1976); *Johnson v. Alexander*, F.2d 16 FEP Cases 894 (8th Cir. 1978); *Harkless v. Sweeny Independent School District*, F.2d 14 EPD ¶ 7669, 5295 (5th Cir. 1977); *Arnold v. Ballard*, (C73-478, USDC N.D. Ohio), Memorandum Opinion and Order dated Mar. 14, 1978; *Lewis v. Bethlehem Steel Corp.*, 440 F.Supp. 949, 963 (1977); *United States v. State of So. Carolina*, F.Supp., 15 FEP Cases 1196 (1977), (3-judge panel that included two circuit judges); *Crocker v. Boeing Co.*, 437 F.Supp. 1138 (1977); *Dickerson v. U. S. Steel Corp.*, F.Supp., 15 FEP Cases 753 (1977); *Veizaga v. National Board of Respiratory Therapy*, 13 EPD ¶ 11, 525, 8875, 8881 (N.D. Ill., January 27, 1977).

"[T]he error in our holding and the views expressed by us is clear. We stated that we agreed . . . with the view that the measure of a claim under the Civil Rights Act is in essence that applied to a suit under Title VII of the Civil Rights Act of 1964. 526 F.2d at 438, 11 FEP Cases at 1061. This was contrary to the principle holding that came in *Washington v. Davis*, *supra*, at 238, 12 FEP Cases at 1418. All of our reasoning and treatment of the case which proceeded from the erroneous standard must be corrected."

Supra at 920.

We believe that Judge Wallace of the 9th Circuit in his dissenting opinion in the case at bar correctly stated the law when he said,

"Because Sec. 1981 is peculiarly linked to the Fourteenth Amendment, the standards pertaining to that Amendment should also control Sec. 1981 [S]ection 1981 enjoys a unique historical and conceptual relationship to the Fourteenth Amendment which is not shared by Title VII. Consequently, it is quite proper to assume absent a contrary holding by the Supreme Court, that the standards for establishing a *prima facie* case of discrimination under Sec. 1981 and the Equal Protection Clause of the Fourteenth Amendment should be the same: There must be proof of discriminatory intent."

Davis v. County of Los Angeles, 566 F.2d 1334 at 1348, 1349, (A. 111).

The *Washington* rule has been held applicable to Sec. 1983 causes of action,⁷ a fact recognized by

⁷*Washington v. Davis*, *supra*; *Chicano Police Officer's Ass'n. v. Stover*, 552 F.2d 918; *Lewis v. Bethlehem Steel*, 440 F. Supp. 949, 963-64.

respondents (Opp. 8). Yet, there is no real basis to distinguish Secs. 1981 and 1983 in regard to the standards of liability governing employment discrimination as both are equal protection statutes (Sec. 1981 is expressly so denominated in the statute heading in 42 U.S.C.) and derived from the Constitution. The intent of Congress during the period 1866-74 as to the nature of the discrimination each prohibited could not have been different.

Any detailed analysis as to which statutes this Court was referring to in *Washington* serves no meaningful purpose, although it appears that the statutes were 5 U.S.C. Sec. 3304 and 5 C.F.R. Sec. 300.101 relating to the District of Columbia's civil service procedures, which, during the litigation, the District asserted included the *Griggs* job-relatedness standards. Casting the question in the context of a "statute" or the Constitution is not conclusive.

Sec. 1981 as well as Sec. 1983 are clearly statutes, but the issue is what standards of liability did Congress intend to be applicable when they were enacted over ninety years ago. This Court, while noting in *Washington*, *supra* at 2051, that under Title VII Congress prescribed the job relatedness rule, expressly declined to expand its ambit to include the Constitution or any other statute except, perhaps, the District of Columbia codes as allowed by the defendants in *Washington*. To the contrary, the Court concluded that the "extensions of the job-relatedness rule beyond areas where it is already applicable by statute, such as the field of *public employment* (referring, Petitioners believe, to the District of Columbia code provisions because Sec. 1981 contains no limitation to public employment)

should await legislative prescription", *Washington v. Davis*, *supra* at 2051, 2052.

Finally, although too obvious to merit extended discussion, the circuit court's *Van Davis* decision effectively renders meaningless in great part the ruling in *Washington v. Davis*. Since there are a great variety of cases where Title VII does not apply, but Sec. 1981 and the 14th Amendment do, the intent requirement of the Amendment could be easily avoided by the simple expedient of pleading under Sec. 1981. If the standard for liability under Sec. 1981 was the same as that under Title VII, there was little reason for Congress to extend Title VII to public employers in 1972.

B. The Decision Fails to Properly Distinguish Between Pre- and Post-Title VII Hiring Practices Contrary to *International Brotherhood of Teamsters v. United States*.

The circuit court's ruling herein acts to make Title VII retroactive as to public agencies and to destroy any distinction between pre- and post-Act hiring practices. This conclusion is symptomatic of the lower federal courts erroneously ignoring, since *Griggs*, the distinction between the Civil Rights Act of 1866 and 1870 and the Civil Rights Act of 1964. Since most discrimination suits are filed under several statutes, the tendency has been to blur the statutory distinctions which, in many cases involving private employers, may have been of no moment since Title VII also applied fully.

It is instructive to note that the lower court Sec. 1981 cases which borrowed the lesser standard of liability from Title VII were decided in the year immediately following the *Griggs* decision, at a period when

Title VII already had been applicable to private employers for at least seven years. In retrospect, it can be seen, beginning with *Chance v. Board of Examiners, supra*, that in the field of public employment the lower courts have failed to maintain the sharp focus distinguishing Secs. 1981/1983 and later the enacted Title VII—although the Circuit Courts in *Chance*, *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972) and *Bridgeport Guardians v. Bridgeport Civil Service Commission*, 482 F.2d 1333 (2nd Cir. 1973), treated Secs. 1981 and 1983 together as constitutional equal protection statutes.

The error in this interpretational leap can be made evident by considering its effect in the context of a private employer. If the *Griggs* decision had been decided in 1966 instead of 1971, then the circuit court's conclusion in the instant case that in terms of liability there is no operational distinction between Title VII and Sec. 1981, would have necessarily made Title VII standards through the mode of Sec. 1981 applicable to private employers prior to its effective date of July, 1965. The fact is, however, that the lower court decisions like the *Davis* case herein, were not decided until long after any applicable statute of limitations had run on a Sec. 1981 claim against a private employer. As the instant case vividly illustrates, the circumstance is the opposite with public employers. By the theory that the *Griggs* standard is now applicable to Sec. 1981 claims, the effective date of Title VII as to public employers has been in practical terms, advanced from three to six years preceding March 24, 1972, depending on the particular jurisdiction's statute of limitations. This is the practical effect despite the

continual admonition by the federal courts that Title VII is not retroactive.⁸

The circuit court opinion in the case at bar ignores the distinction recognized by this Court in *Hazelwood School District v. United States*, U.S., 97 S.Ct. 2736 (1977), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843 (1977), between liability predicated upon pre- and post-Title VII hiring practices. In *Hazelwood*, the Supreme Court reversed the decision of the circuit court because:

"[T]he Court of Appeals totally disregarded the possibility that this *prima facie* statistical proof in the record might at the trial court level be rebutted by statistics dealing with *Hazelwood's* hiring after it became subject to Title VII. Racial discrimination by public employers was not made illegal under Title VII until March 24, 1972. A public employer who from that date forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes."

Hazelwood School District v. United States, U.S., 97 S.Ct. 2736 at 2742.

The Court further noted in footnote 15 of the Opinion that a public employer even before the extension of Title VII in 1972 was subject to the command

⁸*Hazelwood School District v. United States*, U.S., 97 S.Ct. 2736 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843 (1977); *Patterson v. American Tobacco Co.*, 535 F.2d 251, (4th Cir. 1976); *Robinson v. Lorillard*, 444 F.2d 791 (4th Cir. 1971).

of the 14th Amendment not to engage in *purposeful* discrimination, the indication being that constitutional standards governed liability for pre-Title VII hiring practices.

In *International Brotherhood of Teamsters v. United States, supra*, the Court again admonished that the employer was governed by different standards of proof depending on when Title VII became applicable and must be afforded the opportunity to show,

“ . . . that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination, or that during the period it is alleged to have pursued a discriminatory policy it made too few employment decisions to justify the inference that it had engaged in a regular practice of discrimination.”

International Brotherhood of Teamsters v. United States, supra at 1867.

The Court's recognition of a distinction in treatment as well as effect of pre- and post-Title VII hiring practices is meaningful only if the standards of liability are different. If an employer could be held liable under Sec. 1981 for practices that antedated Title VII merely because they had a disproportionate impact and had not been shown statistically to be predictive of job performance, little would be gained by permitting an employer in a Title VII action to distinguish those employment practices occurring before the Act was effective.

III

THE CIRCUIT COURT'S RULING FRUSTRATES THE COMPREHENSIVE CONGRESSIONAL SCHEME EMBODIED IN TITLE VII.

A decision that there is no operational distinction between Sec. 1981 and Title VII in regard to standards of liability will result in serious unsettling and counter-productive effects on Title VII's comprehensive approach to the enforcement of equal employment rights.

Congress, while enacting Title VII in 1964 and again before extending it to public entities by the 1972 amendments, engaged in considerable debate concerning the terms of the Act. Consideration was given as to what employers should be excluded from coverage of the Act and what procedural safeguards should be provided in the administrative enforcement proceedings. Detailed provisions governing the exhaustion of administrative remedies (Sec. 706(b)(c)(d) and (e)), conciliation efforts (Sec. 706(b)), record-keeping and access (Sec. 709), and prerequisites to litigation (Sec. 706(f)(1)), were debated and ultimately enacted. Title VII as finally enacted incorporated the concerns of interested parties and Congress as to safeguarding and accommodating the rights of the employer and the individual. However, it is precisely these rights, representing the collective will of Congress, hammered out after long debate, and having become defined and settled after years of experience, utilization and judicial interpretation that are threatened by the circuit court's decision in this case.

Aside from the standard of liability, the major distinction between Title VII and the older Civil Rights Acts is in the area of coverage and administrative enforcement procedures. All of the forms of remedies

available under Title VII are likewise available under Sec. 1981⁹ including attorneys' fees since the enactment of the Civil Rights Attorneys Fees Awards Act of 1976 (PL 94-559, 90 Stat 2641), amending 42 U.S.C. Sec. 1988. Extending the *Griggs* doctrine to Sec. 1981 suits reduces the difference between the two statutes to primarily the administrative enforcement procedures and this, when coupled with the more generous remedies under Sec. 1981, must inevitably act to frustrate the comprehensive administrative structure that Congress wished implemented with the passage of Title VII. The primary areas of the congressional plan adversely affected are: 1) Jurisdictional filing prerequisites, 2) employers included; 3) limitations on remedies, 4) conciliation and administrative review procedures, 5) uniformity of enforcement procedures, and 6) retroactivity.

A. Jurisdiction Filing Prerequisites Evaded.

Under Title VII, a discrimination charge with the EEOC must be filed within 180 days after alleged unlawful employment practice occurred. Section 706, (e), 42 U.S.C. Sec. 2000e-5(e) as amended, 1972. Thereafter, a civil complaint must be filed in federal court within ninety days of receipt of the notice of the right to sue. 42 U.S.C. Sec. 2000e-5(f)(1). The Supreme Court has held that these prerequisites to a fed-

⁹In fact, in many instances the Sec. 1981 remedy is more expansive, and punitive damages are available under Sec. 1981 but not Title VII (*Johnson v. Railway Express Agency, Inc.*, *supra* at 460). The similar remedies available under Sec. 1981 are back pay (*Sabala v. Western Gillette, Inc.*, 516 F.2d 1251 (1975)), declaratory relief, including reinstatement, promotions and quotas for the class (*Sabol v. Snyder*, 524 F.2d 100a (10th Cir. 1975), *Schei & Grossman, Employment Discrimination Law*, p. 639).

eral civil action are jurisdictional. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

The Court noted in *United Air Lines v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 1889 (1977), that a claim based on a discriminatory act that was not made the basis for a timely EEOC charge was barred and merely constituted an unfortunate past event that had no present legal consequences. However, the failure to comply with any of important Title VII jurisdictional prerequisites will be of little consequence if the plaintiff can take advantage of Title VII's *Griggs* doctrine merely by filing a complaint under Sec. 1981, which is governed only by a less restrictive and non-uniform statute of limitations. Observance of Title VII's administrative requirements is of no significance as the filing of a Title VII charge and resort to the administrative machinery are not prerequisites for institution of a Sec. 1981 action. *Johnson v. Railway Express Agency, Inc.*, *supra* at 460, 95 S.Ct. 1716, 1720 (1975).

B. Liability Standards Extended to Employers Congress Desired Excluded.

Transposing Title VII standards to Sec. 1981 actions would, contrary to the clear legislative intent, effectively bring certain agencies and individuals within Title VII's more restrictive embrace. Congress, when it originally enacted Title VII in 1964, expressly made the Act inapplicable to certain employers, most notably federal, state and local public entities. 42 U.S.C. Sec. 2000e(b) (c), eff. July 2, 1965.¹⁰ As the instant case so

¹⁰Until March 24, 1972, 42 U.S.C. § 2000e(b) read "but such item does not include the United States, . . . or a State or political subdivision of a State. . . ."

clearly demonstrates, if the Circuit Court's decision is upheld these pre-1972 exclusions will be eroded by judicial fiat.

While public agencies have now been brought within the ambit of Title VII by the 1972 amendments, there still remain several categories of employers that Congress intends to exclude from its coverage. Employers covered by the Act must be persons engaged in an industry affecting commerce who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year (Sec. 701(b) of Title VII)). *Bona fide* private membership clubs (Sec. 701(b)(2)), Indian tribes (Sec. 701(b)), and the United States Government (701(b)) are also excluded.

Perhaps, most noteworthy of the exemptions is the Armed Forces which the federal courts have consistently held not to be covered by Title VII as it is not an "employer" as defined by the Act. (*Johnson v. Alexander*, 572 F.2d 1219, 16 FEP 894 (8th Cir. 1978)). As the Armed Forces can be sued under Sec. 1981, it takes little imagination to perceive the effect on the military if the circuit court opinion herein becomes the settled law.

C. Remedies.

The effect of the circuit court's ruling is to encourage plaintiffs to seek relief under Sec. 1981 rather than Title VII, because of the more generous remedies obtainable under Sec. 1981 while still having the advantage of Title VII's liberal standards of proof. Unlike Title VII, actions under Sec. 1981 permit compensatory as well as punitive damages and there is no two-year limitation on back pay awards.

D. Conciliation and Administrative Review Procedures Frustrated.

The greatest damage flowing from the circuit court's decision is that done to the conciliation and administrative review procedures which Congress designed to encourage settlement of cases short of litigation and, thus, avoid the judicial overload bound to ensue as a product of increased enforcement activity. Indeed, conciliation plays such a central role in the scheme of Title VII that the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties. *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1977).

In rejecting a contention that the EEOC was required to conciliate only the precise charges made by the complainant, the district court in *EEOC v. Sherwood Medical Industries*, F.Supp., 17 FEP Cases 444 (1978), remarked:

"This contention, if accepted, would run contrary to congressional intent and could well have the effect of rendering the conciliation requirement of an empty formality. The mandate that conciliation be attempted is unique to Title VII and it clearly reflects a strong congressional desire for out-of-court settlement of Title VII violations. See *Culpepper v. Reynolds Metal Co.*, 421 F.2d 888, 2 FEP Cases 377 (5th Cir. 1970); *Oatis v. Crown Zellerbach*, 398 F.2d 496, 1 FEP Cases 328 LRRM 2782. The legislative history of the 1972 amendments confirms that Congress viewed judicial relief as a recourse of last resort, sought only after a settlement has been attempted and failed. Conciliation is clearly the heart of the Title VII administrative process."

To extend to civil rights claimants the major advantage of Title VII, the standards of discrimination and burdens of proof, to claims under Sec. 1981 without Title VII's concomitant limitations would run directly contrary to the Congressional intent to settle out of court as many discrimination claims as possible.¹¹

The heavy emphasis in Title VII on conciliation efforts before litigation cannot be viewed lightly. The administrative procedures set forth in Title VII reflect the congressional intent to provide victims of discrimination with appropriate redress, while, at the same time, not imposing unreasonable burdens upon employers.

E. Uniformity of Enforcement Actions Endangered.

The confusion resulting from the circuit court holding is illustrated by a consideration of the differing statutes of limitation applicable to Sec. 1981 actions. This Court and the circuit courts have uniformly held that the statute of limitation for Sec. 1981 actions is the most analogous state statute of limitations. *Johnson v. Railway Express Agency, Inc., supra*. Thus, the time limit on such actions ranges from one year to six years depending on the jurisdiction in which the action is filed.¹² In some instances the statute

¹¹In urging the adoption of amendments to Title VII in 1972, the Congressional Committee noted that during the first five years of the EEOC's existence it received more than 52,000 charges. During the first 7½ months of the 1971-72 fiscal year the Commission received 14,644 charges—*U.S. Cong. and Admin. News* '72, p. 2139.

¹²6-year Statute of Limitation, Penn., *Dickerson v. U.S. Steel Corp.*, F.Supp., 15 FEP Cases 752 (1977). 1-year Statute of Limitation, Tenn., *Johnson v. Railway Express Agency, Inc., supra* at 463.

of limitations varies within the same state.¹³ An additional lack of uniformity is created by the fact that provisions regarding tolling, revival and application are interpreted under state law. *Johnson v. Railway Express Agency, Inc., supra*.

Unlike the situation under Title VII, employers, many of whom have offices in several jurisdictions, would not be governed by uniform filing and limitation requirements under Sec. 1981; yet, if the circuit court's conclusion in the instant case is accepted, these employers would be subject to Title VII's more rigorous and demanding standards of proof. As this Court observed in *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, (1977), in noting a distinction between Title VII and other actions, the "Title VII defendant is alerted to the possibility of an enforcement suit within ten days after a charge has been filed. This prompt notice serves, as Congress intended, to give him an opportunity to gather and preserve evidence in anticipation of a court action".

The need to provide procedural safeguards for the rights of employers was clearly emphasized by Congress when the 1972 Title VII amendments were being considered. The congressional committee, noting that employers could be subject to enormous mandatory penalties in the absence of a definite limitation and that due process required prompt notice of a charge, stated in the Committee Report, "to avoid the litigation of state charges and to preclude respondents from being subject to indefinite liabilities, it is clear that a precise

¹³In Colorado a 2-year (*Ray v. Safeway Stores, Inc.*, F.Supp. (1976))), and a 6-year Statute of Limitation (*Jackson v. Continental Oil Co.*, F.Supp. (1975)) have been held to apply.

statute of limitations is needed. . . . It seems patent that failure to require timely notice violates all concepts of due process. In view of the specific abuses regarding service of charges under Title VII, a specific requirement for service on the respondent within a specified time period (5-7 days) is a prerequisite to maintaining minimum standards of process". *U.S. Cong. & Adm. News '72*, p. 2175.

A holding that the measure of discrimination is operationally the same under Sec. 1981 and Title VII would, thus, in practice operate to deprive the defendant of essential procedural safeguards noted in *Occidental*.

F. The Decision Renders Title VII Retroactive as to Public Agencies.

The extension of Title VII liability standards to Sec. 1981 actions challenging public agency hiring practices that occurred before the effective date of Title VII undeniably renders Title VII retroactive, contrary to the decisions of this Court.

In *International Brotherhood of Teamsters v. United States*, *supra* at 1867, and *Hazelwood School District v. United States*, U.S., 97 S.Ct. 2736, 2742, the Supreme Court expressly noted the difference in treatment between pre- and post-Title VII hiring practices and stated that discrimination by public employers under Title VII was not made illegal until March 24, 1972. Earlier in *Franks v. Bowman Transportation Company*, 424 U.S. 747, 759 n.12, the Court in affirming the principle that the effect of the Act was prospective, not retrospective, quoted an interpretive memorandum from the *Congressional Record*. This memorandum states in pertinent part:

"Title VII would have no effect on establishing seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all white working force when the Title VII comes into effect the employers' obligation would be to simply fill future vacancies on a non-discriminatory basis."

Franks v. Bowman Transportation Co., 424 U.S. 747, n.12 at 759.

The circuit courts have uniformly held that Title VII is not retroactive and provides neither liability nor a remedy for discriminatory acts occurring before its effective date. *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976); *Robinson v. Lorillard*, 444 F.2d 791 (4th Cir. 1971); *Place v. Weinberger*, 497 F.2d 412 (6th Cir. 1974).

In view of the settled law, it makes little sense to attempt to distinguish the present case simply because liability was found under Sec. 1981 when that liability was predicated entirely upon a standard that evolved solely from an interpretation of Title VII (*Griggs v. Duke Power*).

Although this Court has recognized that Title VII and Sec. 1981 are separate and distinct statutes upon which a claimant can base a claim of racial discrimination, it is completely appropriate in determining the liability standard under Sec. 1981, to consider Congress's understanding of the scope of Sec. 1981 at the time they enacted Title VII. In view of the legislative history (see pp. 16-17, *infra*) of Title VII, the conclusion is inescapable that Congress intended that statute to create additional rights and remedies in the

field of employment discrimination not available under the then existing law—for otherwise the Act's procedural and jurisdictional limitations would have no meaning. In this limited but significant sense then, Sec. 1981 should be construed to further, not frustrate, the intent of Congress. If Congress had believed at the time it enacted Title VII that they were merely restating the liability standards under the venerable Sec. 1981 or were changing them, then it acted at cross-purposes to their desire to expand remedies when it imposed procedural limitations.

IV

NO TITLE VII VIOLATION PROVEN.

The first recruit class hired by the petitioners after the effective date of Title VII was composed of 50% blacks and Mexican-Americans. The individuals in this class took the 1972 written aptitude test of which 97% received passing scores, and advanced to the oral interview and subsequent phases of the examination process. The subsequent elements in the process did not have an adverse impact on minorities and the respondents in their first and second amended complaints alleged that the ultimate hires were nondiscriminatory (A. 5, 6). All subsequent hires, of course, were in accordance with the Court's judgment of July 20, 1973 requiring that 40% of all new hires annually be black and Mexican-American.

As the respondents have agreed, the quota hiring order was necessarily affirmed on the basis of hiring that occurred prior to the effective date of Title VII (Opposition p. 29). To assert that the petitioners "utilized" the 1972 test after Title VII's extension to public agencies is misleading in the context of the

facts and forms no legally cognizable basis for a finding that Title VII has been violated. Written tests have no impact until actually used as a basis for hiring or rejection of applicants. It is conceded that the 1972 written test was not used in any adverse sense toward minorities in accepting or rejecting them for employment. Ninety-seven percent of all applicants passed the test and all advanced to further, admittedly non-discriminatory, stages in the selection process. Only in this way was the 1972 test actually used and is the only factual basis upon which a court can adjudicate whether Title VII has been violated. The petitioners' uneffectuated proposal in the face of an extremely serious shortfall in firemen to interview on a preliminary basis the top 544 applicants taking the 1972 written test does not constitute a violation of Title VII any more than it can support the quota hiring order which the respondents concede was predicated upon claimed earlier Sec. 1981 violations. The interviews when finally commenced were not limited to the top 544 candidates, and the uneffectuated proposal obviously played no role in the ethnic composition of the petitioners' fire department.

Not only has no effective discriminatory act occurred since March 24, 1972, the threshold conditions for asserting a Title VII violation were never reached. A violation of Title VII requires proof of a pattern and practice of discrimination. Isolated incidents, even with some discriminatory effect, are insufficient to establish liability under that statute. *Hazelwood School District v. United States*, U.S. (1977), 97 S.Ct. 2736. There is simply no evidence in the record to sustain any finding of a pattern and practice of discrimination by petitioners after Title VII became effective.

The respondents' minimum height standard cannot independently constitute a violation of Sec. 1981, Sec. 1983 or Title VII simply because there was no discriminatory intent behind its application and the hiring after the effective date of Title VII was accomplished pursuant to the Court's quota order. The respondents expressly declined before the district and circuit court to seek elimination of the height standard¹⁴ and the hiring results since 1972 (55% blacks and Mexican-Americans) belie any adverse effect in operation of such a standard. Minimum height standards have been upheld as having a rational basis in non-Title VII cases (*Smith v. Troyan*, 520 F.2d 492 (6th Cir. 1975), cert. den. U.S. Supreme Court). Finally, the respondents lacked standing to challenge the height requirement as none of the named plaintiffs (whether applicants or incumbents) had suffered any injury in fact as a consequence of its application since each met the minimum standard.

An independent question exists as to whether a public agency can be found guilty of violating Title VII in the face of an express finding of no discriminatory intent. The congressional debates on Title VII and at the time of its extension to public employers clearly indicate that Congress did so under the authority and scope of the Fourteenth Amendment (see Legislative History, U.S. Cong. & Adm. News '72, p. 2154;

¹⁴The respondents stated the basis for their circuit court appeal thus, "The only modification of the Judgment sought on this appeal is an increase in the Mexican-American hiring ratio, such increase to be ordered if there is a reversal by this court of appeal of the district court's conclusion of law that the height standard is job-related and legal. Plaintiffs-appellants did not seek below and do not seek on this appeal, an order enjoining the use of 5'7" height standard". (Brief of Appellants, 9th Cir., p. 3, lines 21-27.)

H.R. Rep. No. 92-238, p. 19 (1971); S. Rep. No. 92-415, pp. 10-11 (1971)). The standards of liability for employment discrimination under Title VII as to public employers can be no greater than that prescribed by the Constitution. Two federal courts thus far have held that purposeful interest is a requirement for establishing a Title VII violation against state agencies or its political subdivisions.

Scott v. City of Anniston, (N.D. Ala. 1977), 430 F.Supp. 507;

Friend v. Leidinger, (D.C., E. D. Va. 1977), 17 EPD ¶ 8392, 5978.

The U.S. Supreme Court has twice declined to pass on the issue on the basis that it was not properly before the Court. See *Dothard v. Rawlinson*, U.S., 97 S.Ct. 2920 at 2724 n.1, and *Hazelwood School District v. United States*, U.S., 97 S.Ct. 2736 at 2731 n.1.

V

THE AFFIRMED QUOTA HIRING ORDER CLEARLY EXCEEDS THE COURT'S REMEDIAL AUTHORITY.

The district court's quota hiring order was illegal and exceeded its jurisdiction for the following reasons: 1) The absence of a finding of intentional discrimination; 2) the fact that the discriminatory acts, if any, causing the present work force/labor pool disparity that is the object of the Court's order took place prior to the effective date of Title VII and the applicable statute of limitations for Sec. 1981; 3) the lack of standing as found by the circuit court because the plaintiff class did not include past applicants who were affected by any past practices; and 4) the quota order is totally unrelated to any proven effects of discrimina-

tion and attempts to mandate ethnic balance in the work force contrary to Sec. 703(j) of Title VII.

None of the named plaintiffs not already employed by the fire department had been applicants for the 1969 or any other prior examination. The respondents' complaint specifically alleged that the suit was brought on behalf of a class composed of all persons who are either black or Mexican-American and who are *current* or *future* applicants for employment as Los Angeles County firemen (A. 3). The first and only examination for County firefighter they had taken was the 1972 examination which in application had no adverse effect. The plaintiffs that were current firemen on the force, had, of course, passed some previous exam and were thereafter employed. The circuit court correctly concluded the plaintiffs lacked standing to challenge defendants' prior use of a written qualification test in 1969.¹⁵ In light of the clear facts and this Court's ruling in *East Texas Freight v. Rodriguez*, 431 U.S. 395 (1977), such a finding was inescapable.

It thus follows that if the district court had no jurisdiction to declare the use of the 1969 test illegal (even absent a deliberate intent requirement), the court had no jurisdiction to impose a quota hiring order that could only be for the purpose of providing a

¹⁵The Court's ruling on lack of standing would necessarily encompass any previous employment practice not applied to plaintiffs as they could perforce have suffered no injury if they had not been candidates. Footnote 6 (A. 83) to the circuit court's majority opinion indicates that this was their understanding.

remedy for the consequences of a test the plaintiffs had no standing to challenge.

Contrary to respondents' assertions in their Opposition to the Petition herein, merely being of the same race as the alleged discriminatees is not sufficient to confer standing in the absence of an individual claim of injury. Respondents' position is contrary to this Court's decision in *East Texas Freight v. Rodriguez* and if adopted, must necessarily destroy the established concepts of standing. In this regard, it is of particular significance that not only were there no past rejected applicants named as plaintiffs, the suit was expressly brought only on behalf of current and future applicants (A. 5, 6).

Assuming *arguendo* that deliberate intent to discriminate is not necessary for liability under Sec. 1981 and that somehow the plaintiffs have standing to obtain a quota order as a remedy for a test they have no standing to challenge, the quota order requiring the entire fire department to achieve racial balance with the County's general population exceeds the Court's remedial authority for the following reasons: 1) It attempts to remedy purported discrimination (not supported by any finding of a discriminatory act) that could only have occurred prior to the three-year statute of limitations cut-off period governing Sec. 1981 claims (January 11, 1970);¹⁶ 2) The order is contrary to the holding in *United Air Lines v. Evans*, 431 U.S. 553 (1977) that time barred claims have no

¹⁶The petitioners, pursuant to the quota hiring order, have to date hired more blacks and Mexican-Americans (207) than the number of persons of all races (187) hired as a result of the 1969 written test.

present legal consequences. The order is clearly intended to remedy past discriminatory practices unconstrained by any time limitations. In fact, the plaintiffs admit that past applicants who are time barred from suing will benefit from the quota order when they reapply. (Opp. 32.) At page 29 in respondents' Opposition they state: "Plaintiffs agree that the remedial hiring order herein was based on a pattern and practice of discriminatory practices that were unlawful only under § 1981, not Title VII." In this context, any statute of limitations, whether under Sec. 1981 or Title VII, is rendered meaningless; 3) Contrary to the principle that quota orders are limited to the extent of the violation proven and issued only in extreme circumstances, the district court's sweeping order herein simply seeks to achieve racial balance between the work force and the general community. This is directly contrary to the intent of Congress as expressed in Sec. 703(j) of Title VII, as well as several pronouncements of this Court.

Recently, including the decision in *Regents of the University of California v. Bakke*, U.S., 17 FEP Cases 1000 (1978), the Supreme Court has expressed concern that the remedies for discrimination not exceed the effects of the established violation. In *Milliken v. Bradley*, 418 U.S. 717, the Supreme Court found the school desegregation order requiring the crossing of district boundaries was not proper because there was no predicate of a constitutional violation or the identification of any significant segregative effects resulting from unconstitutional conduct. The order was held impermissible because it was not commensurate with the constitutional violation

to be redressed. This principle was restated in *Hills v. Gautreaux*, 96 S.Ct. 1538 (1976).

Limitations on a trial court's remedial authority in race discrimination cases was again underscored in *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 97 S.Ct. 2766 (1977), wherein the District Court after finding constitutional violations ordered district-wide racial student redistribution until each school was brought within 15% of the black/white population ratio of Dayton. The Supreme Court vacated and remanded on ground that the federal court had exceeded its remedial authority to tailor the remedy to the extent of the constitutional violation. The Court held that there was no justification for the disparity between the evidence of the effects of the constitutional violation and the sweeping redistribution order.

Although *Milliken*, *Hills*, and *Dayton* involved illegal school segregation, the principle that the remedy must not exceed the extent of the violation proven is equally applicable to employment discrimination cases, particularly when the effect of such a remedial order is to discriminate in a very real sense against other races not sharing any culpability for past discriminatory practices. The quota order in this case is very similar in scope to those found defective in *Milliken* and *Dayton*. Premised on the most tenuous of grounds and unsupported by any evidence, it assumes that perfect racial parity would have been achieved in the absence of discrimination—and therefore ordered quota hiring until the entire department achieved current racial parity.¹⁷ As emphasized herein, this was under-

¹⁷The current composition of the entire department has evolved during at least a 30-year period. Indeed, unless one
(This footnote is continued on next page)

taken in complete disregard of standing considerations, the statute of limitations, and any correlation between the effects of the only act found illegal (the 1972 written test) and the quota order. This is particularly unfortunate because of the complete lack of any identifiable victims and the respondents' express allegation that they represented only present and future applicants.

Limitations on the scope of quota orders in employment discrimination cases should be consistent with those applicable to other remedies, such as reinstatement, back pay and retroactive seniority, all of which this Court has construed to be limited by the statute of limitations, the damage actually proven, or by the scope of the applicable statute under which the violation was found.¹⁸ *Franks v. Bowman Transportation Company*, 424 U.S. 747 (1976). Indeed, the limitations on racial hiring quotas should be even more stringent because, unlike the other remedies such as back pay and retroactive seniority, they impact not so much upon the employer, but upon innocent individuals who did not share in the discriminatory practices or profit therefrom.

The majority in *Bakke* observed this inherent unfairness in remarking that while racial classifications have been designed as remedies for the vindication of constitutional entitlements, "the scope of the remedies was

assumes that *all* of the 1760 firefighters on the force had been hired in the eight years immediately preceding the lawsuit, the quota order seeks to remedy unproven discrimination occurring even before the original enactment of the Title VII in 1964.

¹⁸In *Albemarle v. Moody*, 422 U.S. 421 at 423, the Supreme Court stated that there should be no drastic distinction between injunctive and back pay relief, a concept at odds with the quota order herein.

not permitted to exceed the extent of the violations . . ." and further that ". . . the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit". *Regents of the University of California v. Bakke*, slip op. pp. 31, 38, *supra* at 1014-17. Again in *Furnco Construction Corp. v. Waters*, U.S. (1978), the Court admonished that "[i]t is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race without regard to whether members of the applicants' race are already proportionately represented in the work force". (Emphasis in original).

The sweeping quota order in the instant case patently violates the above principles and furnishes independent grounds for reversal.

Conclusion.

The facts of the instant case reveal that it is the classic one to measure the liability distinctions between Title VII and Sec. 1981 and to harmonize Secs. 1981, 1982, 1983 and 1985(3) by recognizing a uniform standard of liability for non-Title VII employment discrimination claims. There were no claims of discriminatory hiring after Title VII became effective, no discriminatory intent in the use of any hiring practices, and no standing by plaintiffs to challenge the pre-1972 hiring practices. This case is the appropriate one for the Court to make its *Washington v. Davis* intent rule complete and consistent in application to similar equal protection and constitutionally derived statutes of the same era.

Both Congress and this Court have recognized the unique nature of Title VII resulting in its being construed differently than predecessor anti-discrimination statutes. It is only within the context of Title VII, a statute that was prior to 1972, expressly inapplicable to public agencies such as the Petitioner, that the *Griggs* doctrine has evolved. Incalculable harm will result if legislative history and judicial precedent are ignored and unique Title VII derived standards are transposed to independent Sec. 1981. These include as a minima its retroactive effect on public agencies, the thwarting of the congressional limitations forming an integral part of Title VII which will inevitably encourage a flood of litigation and, perhaps most significantly, the expansion of the *Griggs* doctrine beyond the employment context.

Liability was found upon a showing of potential but unrealized disproportionate impact of the 1972 test, the circuit court holding that the respondents lacked standing to challenge the 1969 test. The quota hiring order was, therefore, predicated solely upon the current racial composition of the Fire Department, without distinction between pre- and post-Title VII hiring and without proof of any illegal pre-Title VII practices.

The excessive quota order, in complete disregard of standing, the Statute of Limitations, and totally divorced from the effects of any proven violation is clearly beyond the district court's authority and, by itself, constitutes compelling grounds for reversal.

Judgment of the Ninth Circuit should be reversed with direction that the order of the district court be vacated and the Complaint dismissed.

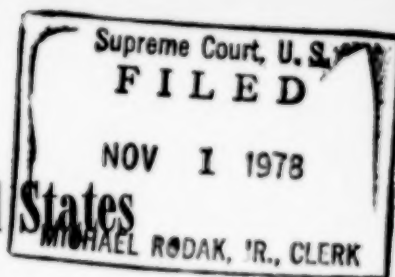
Respectfully submitted,

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September, 1978.

IN THE
Supreme Court of the United States



October Term, 1978
No. 77-1553

COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS
OF THE COUNTY OF LOS ANGELES; and CIVIL SERV-
ICE COMMISSION OF THE COUNTY OF LOS ANGELES,

Pctitioners,

vs.

VAN DAVIS, HERSHEL CLADY and FRED VEGA, in-
dividually and on behalf of all others similarly situated,
WILLIE C. BURSEY, ELIJAH HARRIS, JAMES W.
SMITH, WILLIAM CLADY, STEPHEN HAYNES, JIMMIE
ROY TUCKER, LEON AUBRY, RONALD CRAWFORD,
JAMES HEARD, ALFRED R. BALTAZAR, OSBALDO A.
AMPARAH, individually and on behalf of all others similarly
situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit.

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IN THE
Supreme Court of the United States

October Term, 1978
No. 77-1553

QUESTIONS PRESENTED

1. Whether or not purposeful discrimination is a prerequisite to liability under 42 U.S.C. §1981.
2. If the answer to the first question is in the affirmative, whether or not there was a showing of purposeful discrimination in the instant case.
3. Whether or not Defendants may raise the standing issue before this Court.
4. Whether or not the hiring order which issued below is appropriate and is constitutional as "mirroring" the illegal discrimination proven.

COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS
OF THE COUNTY OF LOS ANGELES; and CIVIL SERVICE
COMMISSION OF THE COUNTY OF LOS ANGELES,

Petitioners,

vs.

VAN DAVIS, HERSHEL CLADY and FRED VEGA, individually and on behalf of all others similarly situated, WILLIE C. BURSEY, ELIJAH HARRIS, JAMES W. SMITH, WILLIAM CLADY, STEPHEN HAYNES, JIMMIE ROY TUCKER, LEON AUBRY, RONALD CRAWFORD, JAMES HEARD, ALFRED R. BALTAZAR, OSBALDO A. AMPARAH, individually and on behalf of all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit.

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

A. Background

The Plaintiffs/Respondents in this case are blacks and Mexican-Americans ("Plaintiffs"). The Defendants/Petitioners are the County of Los Angeles and two constituent agencies of that County ("Defendants").

This action was commenced on January 11, 1973. The original complaint alleged violations of 42 U.S.C. §1981 ("Section 1981") and 42 U.S.C. §1983, as

well as the Fourteenth Amendment (R. 1-9).¹ By way of a Second Amended Complaint filed on May 3, 1973, allegations were added that Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e *et seq.* ("Title VII") had been and was being violated (R. 60-68). Attached as copies to that Second Amended Complaint were copies of the Plaintiffs' charges filed with the Equal Employment Opportunity Commission ("EEOC") and the "right to sue" letters which had been issued to the Plaintiffs pursuant to Section 706(f)(1) of Title VII (R. 69-73).

The case proceeded to trial on June 5, 1973 and June 6, 1973 (Tr. 1-262).² In addition to the oral testimony and thirteen exhibits which were admitted into evidence at trial, the evidence before the District Court included extensive and extremely important stipulations of fact between the parties. These stipulations are found in a Pre-Trial Order filed and signed by the Court at the commencement of trial (R. 132ff; stipulations at 136-141).

The District Court found that Defendants had engaged in discriminatory employment practices violative of Title VII and Section 1981 (R. 163-164).

The Judgment entered by the District Court established a forty percent minority annual hiring goal (R. 167). The Judgment, which has been in effect since July, 1978 (R. 166), specifically provides at paragraph seven that the hiring order shall not be deemed "to require or encourage" defendants to hire unqualified firefighters or "to lower or refrain from increasing job-related standards" (R. 168). The Judgment pro-

¹"R." refers to a reference to the record in the Court of Appeals, which has been forwarded to the Supreme Court.

²"Tr." refers to the Trial Transcript which is part of the record on appeal and which has been forwarded to the Supreme Court.

vides that the decree is "subject to modification" in the event the hiring order is in conflict with the above-stated terms of paragraph seven (R. 168). No modification of the decree has been sought by Defendants during the five years of its operation; indeed, the result of the Judgment has been that, despite the fact there were virtually no minorities employed as of the date this lawsuit was commenced (R. 136), 207 minority firemen have been hired since the Judgment was entered (Defendants' Brief, p. 10).

B. Liability

The primary basis for the District Court's finding of liability is found at finding of fact number two (R. 160) and at conclusion of law number four (R. 163) which read as follows:

"2. The workforce at the time the complaint herein was filed, at the Los Angeles County Fire Department, consisted of 1,762 firemen, of whom nine (0.5%) are black and fifty (2.8%) are Mexican-American. In Los Angeles County, 10.8% of the inhabitants are black and 18.3% are Mexican-American. Defendants did not justify, at the trial or other proceedings herein, the paucity of black and Mexican-American firemen employees at the Los Angeles County Fire Department, as compared to the general population statistics for those minority groups.

"4. In cases involving discrimination based on race and national origin, 'statistics often tell much, and Courts listen.' *Alabama v. United States*, 304 F.2d 583, 586 (5th Cir. 1962), *aff'd per curiam*, 371 U.S. 37 (1962). In employment discrimination cases it consistently has been held that where employment statistics, such as those before the

Court, reveal a severe disproportion between the percentage of minority employees and the percentage of minorities residing within the relevant geographical area in which the employer is located, a *prima facie* case of discrimination is established. See e.g., *United States v. Local 86, Ironworkers*, 315 F. Supp. 1202, 1236 (W.D. Wash., 1970), *aff'd* 443 F.2d 544, 551 (9th Cir. 1971) *cert. denied* 404 U.S. 984 (1971); *United States v. Hayes International Corp.*, 456 F.2d 112, 120 (5th Cir. 1972); *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, 426 (8th Cir. 1970). Defendants in this case did not rebut the *prima facie* case for Plaintiffs established by the statistics, cited in Findings of Fact Number Two (2)."

The evidence as found in the Pre-Trial Order stipulations and as adduced at trial showed that Defendants had engaged in numerous employment practices which operated to the detriment of minorities and which were not job-related or justified by business necessity. The evidence as to these practices, most of which were carried out both before and after March, 1972, when Title VII became applicable to public employers, can be summarily described as follows:

1. Recruitment

The head of the County Personnel Department testified at trial that prior to 1969 Defendants did little or no recruiting in black and Mexican-American communities, but instead relied on "word of mouth" recruitment by their all white workforce (Tr. 30-32).

It also was admitted at trial by the head of the County Personnel Department that the Los Angeles County Fire Department had a reputation as a discriminatory employer in the minority communities of Los

Angeles County due to the fact few minorities are employed (Tr. 52). In apparent reference to the failure to recruit despite the bad reputation, the District Court specifically found that Defendants had engaged in the illegal employment practice of "failing and refusing to take necessary affirmative steps to overcome the existence in the black and Mexican-American communities of Los Angeles County of a reputation that the Los Angeles County Fire Department discriminates against blacks and Mexican-Americans."

2. Written Tests

Stipulations found in the Pre-Trial Order (R. 138-139) show that "for several years" Defendants had administered written tests to applicants for hire as firefighters which had an extremely severe adverse impact upon black and Mexican-American applicants; indeed, for example, in 1969 approximately 25% of the applicants were black and Mexican-American (R. 137), but, as a result of the written test, only five blacks and seven Mexican-Americans were hired as compared to 175 whites (R. 138).

It was stipulated in the Pre-Trial Order (R. 139) that "[n]o studies establishing the validity of the written entrance tests have been conducted according to the procedures set forth in the Equal Employment Opportunity Commission Guidelines, 29 CFR §1607, 35 Fed. Reg. 12333 (August 1, 1970)."

Defendants realized as early as May, 1971 that their written tests violated applicable federal law. Plaintiffs' Exhibit 8, received into evidence at trial,³ is a memo from the head of the Los Angeles County Personnel Department to the Los Angeles County Civil

³For the Court's convenience, a complete copy of Plaintiffs' Exhibit 8 is attached hereto as Appendix "A".

Service Commission. Page three of this memo is entitled a "Fact Sheet on the Fireman Exam" and reads as follows in relevant part:

"3. The current test for Fireman *does* discriminate against minorities. (Although we had over 407 Blacks applying for Fireman the last time this test was given, only four were within appointment range on the list and hired. Of 126 Chicanos, only 5 were within reach on the list and subsequently hired.)

"4. A recent Federal Supreme Court decision on testing, *Griggs et al v Duke Power Company*, holds that this type of test is in violation of the Civil Rights Act of 1964.

"6. We are not staffed to interview all of the 5000 plus candidates whom we estimate will apply for Fireman on an open-competitive examination, and *the alternative of using our existing written examination as an administrative device for selecting a group of applicants whom we can interview for the Fireman positions (approximately 600 applicants to be interviewed for 80 jobs) places us in the position of knowingly discriminating.*" (second emphasis added).

Despite the above-quoted memorandum which stated that use of the written test "places us in the position of knowingly discriminating", on December 1, 1972, the head of the County Personnel Department formally recommended by way of a memorandum that the written test be used to eliminate all candidates except the top 500 (Plaintiffs' Exhibit 7). This memorandum of December 1, 1972, itself recognized "there is some possibility that this action will be challenged in the Courts". This practice of interviewing the top 500 candidates (544 actually were interviewed) had the

effect of continuing the severe adverse impact of the written test because of those to be interviewed, only 1.8% were black and 6.0% were Mexican-Americans (R. 140-41).

As was anticipated in the December 1, 1972 memo, the Defendants' practice of utilizing the written test was "challenged", namely by the instant lawsuit. In response to this lawsuit, and only because of this lawsuit, Defendants discontinued the utilization of the written test (R. 140-41; Tr. 48-49).

Despite the fact the tests had been utilized in earlier years to decide which applicants would be placed at the top of the list of persons to be hired (R. 138), the head of the Los Angeles County Personnel Department testified that in his opinion it is not possible to devise a written test for a job such as firefighter which validly ranks applicants (Tr. 55).

3. Height Requirement

It was stipulated by the parties that prior to 1971 Defendants required all applicants to be 5'8" in height, that in 1971 the requirement was lowered to 5'7", and that "no studies have been conducted establishing the validity of the height standards" (R. 140). It also was stipulated at trial that 45% of the Mexican-Americans in Los Angeles County, as compared to approximately 14% of the whites, are eliminated by a 5'7" height requirement (Tr. 200).

The District Court concluded that the height requirement was legal, but the Ninth Circuit Court of Appeals reversed (R. 163; 566 F.2d at 1341-42). Defendants' petition for certiorari did not challenge the Court of Appeals holding that the height requirement is violative of Title VII.

C. Relief

The District Court entered a Judgment which, among other things, established a goal for Defendants of hiring twenty percent blacks and twenty percent Mexican-Americans as new firefighters (R. 167). The District Court made it clear that the goals established by the Judgment were not impermissible "quotas" since paragraph seven of the Judgment (R. 168) reads as follows:

"7. Nothing in this Order shall in any way be deemed to require or encourage Defendants: (a) to employ any person not qualified for a fireman position with the Los Angeles County Fire Department; or (b) to in any way lower or refrain from increasing the standards for employment as firemen at the Los Angeles County Fire Department, provided such standards are reasonably related to the qualifications of potential firemen; all other provisions in this order are subordinate to the provisions of this paragraph numbered seven (7) and shall be subject to modification in the event of any conflict herewith."

In Finding of Fact number six (R. 161), the District Court explained the need for the establishment of the goals, stating as follows:

"6. The accelerated hiring to be ordered by the Court is based on all Findings, including the following considerations:

(a) it seems evident, as officials of Defendants testified at the trial, that Defendants will have no difficulty finding sufficient numbers of qualified black and qualified Mexican-American potential firemen to fill the required ratios;

(b) it is in the public interest to accelerate the elimination of the racial imbalance at the Los Angeles County Fire Department caused by the past discrimination of Defendants;

(c) it appears that unless the Court orders accelerated hiring at the Los Angeles County Fire Department, there will not be sufficient hiring of blacks and Mexican-Americans as is necessary to overcome the presently existing effects of past discrimination within a reasonable period of time;

(d) it appears that a Court order requiring accelerated hiring of minorities will aid those officials of Defendants who desire the elimination of the effects of past discrimination, in that such an order in all likelihood will make minority recruiting efforts more effective."

The grounds for Finding of Fact 6(c), quoted immediately above, to the effect that absent the hiring order the effects of the past discrimination would not be eliminated, are obvious. As described and discussed above in Section "B.2." of the Statement of the Case, in December of 1972 and January of 1973, several months after Title VII became applicable to public employers, Defendants were in the process of utilizing a written test which Defendants *knew* was illegal. The practical need of Court-imposed goals for such an employer need not be elucidated.

Chief Barlow of the Los Angeles County Fire Department was called as a witness by the *Plaintiffs* at the trial. During his testimony the following exchange occurred between the Court and Chief Barlow:

"THE COURT: All right. Now, I already felt that I may have asked you the questions that may have been unfair to you in your position and put you on the spot. I have no desire so to do. But I am anxious to get whatever point of view I can from you as a responsible representative of the fire department.

If I were to make an order requiring that any hiring of fire department personnel be of a particu-

lar racial proportion, as you sit there now, do you see any way in which that would pose an unfortunate problem to the fire department?

THE WITNESS: *Only* that it would reflect that we did not have the ability to meet our obligation and our commitment. I think that in terms of the personnel of the department, their reflection would be that—or an inference that some lack of standard was—or a standard was not followed that would be somewhat less than what they've had in the past. I think the answer is simple. I feel that my main concern would be the fact that we have not performed in terms of what our responsibility was.

THE COURT: Well, in actuality you haven't, have you?

THE WITNESS: *That's right.*" (emphasis added) (Tr. 193).

Chief Barlow also testified as follows (Tr. 150-51) concerning the advisability of a Court-imposed hiring order:

"Q Is it fair to say, Chief Barlow, that in your opinion if the Court issued a hiring ratio in this case which required the hiring of one black and one Mexican American for each white hired, that there would be no problem in the fire department?

A I would not anticipate this.

THE COURT: You would not anticipate any problem?

THE WITNESS: Any problems."

At trial there also was uncontradicted expert testimony from an industrial psychologist that a hiring order would produce applicants "as well qualified as those selected in the past" (Tr. 212-213). Similarly,

the head of the Los Angeles County Personnel Department testified that in his opinion a Court-imposed hiring order would not affect the quality of firefighters hired (Tr. 60-61).

The District Court did not explain the reason forty percent was chosen as the annual hiring goal, other than to state that the goal would have been higher for Mexican-Americans but for the District Court's determination that the height requirement was legal (R. 161-162). It is noteworthy, however, that in July, 1972, the head of the Los Angeles County Personnel Department had stated in a memorandum to the County Civil Service Commission that "a goal of 50% minorities for all new firemen hires seems reasonable. . . ." (Plaintiffs' Exhibit 9, at p. 2). Similarly, the head of the Personnel Department testified at trial that he had recommended a procedure whereby only County employees could apply to be firefighters, in the belief that such a procedure would cause an "increase" in minority representation in the fire department "in greater numbers than the population and the general public" (Tr. 52-54, 69-70).

D. Cessation of Discrimination

In their memorandum, Defendants repeatedly refer to the fact that no "discriminatory hiring" took place at the Los Angeles County Fire Department after the effective date of Title VII. The Court should be aware that this version of the facts is only technically true. The more basic point and a more accurate description of the true facts is that: (a) long after the effective date of Title VII, Defendants were in the process of carrying out a hiring program based on a testing system which Defendants *knew* violated Title VII (See Section "B" of Statement of Facts above); and (b) Defendants ceased these illegal practices solely in re-

sponse to the instant lawsuit (See Section "B" of Statement of Facts above).

Plaintiffs submit that under these circumstances the factual situation before the District Court can most accurately be described as being one where prior to the effective date of Title VII, Defendants engaged in various employment practices which had the effect of virtually excluding minorities from employment as firefighters and after Title VII became applicable, Defendants continued these practices until learning that this lawsuit was to be brought. Due to the fact, however, that no hiring was actually consummated between March, 1972 and the date of the commencement of the instant lawsuit, no illegal hiring was actually completed after the effective date of Title VII. This point is of no particular importance, however, since the instant lawsuit also was prosecuted under Section 1981, assuming of course that Title VII principles and standards of liability are applicable in Section 1981 cases.

E. Court of Appeals

On appeal to the Ninth Circuit Court of Appeals, by way of an opinion dated October 20, 1976, the Ninth Circuit at first upheld the District Court in all respects other than a ruling that the District Court had erred in holding Defendants' height requirement to be job-related. The Ninth Circuit instructed the District Court to reconsider upon remand its limitation on the hiring order due to the Court of Appeals reversal on the height issue (See Appendix "B" to Petition for Certiorari).

Defendant then filed a petition for rehearing, arguing that this Court's ruling in *Washington v. Davis*, 426 U.S. 229 (1976) required a holding that wilful or purposeful discrimination must be proven before liability can be established under Section 1981. The Ninth

Circuit reheard the case and issued a new opinion on December 14, 1977. 566 F.2d 1334.

In this December, 1977 opinion the Ninth Circuit ruled that this Court's opinion in *Washington v. Davis* is limited to "constitutional issues" and therefore is inapplicable to Section 1981 cases. 566 F.2d at 1339-41. Also in this new opinion, although the issue was not before the Court on the petition for rehearing, the Ninth Circuit noted that due to the fact the scope of the represented class did not include past applicants, Plaintiffs lacked standing to challenge a 1969 written test administered by Defendants. 566 F.2d at 1337-38. The Ninth Circuit ordered a remand and instructed the District Court to reconsider the hiring order not only in light of the reversal on the height requirement, but also in light of the holding that due to the narrow scope of the class the Plaintiffs lacked standing to challenge the 1969 written test. 566 F.2d at 1337-38.

F. Issues Before Supreme Court

The Petition for Certiorari by Defendants herein raises two issues, which can be stated as follows: (1) whether or not purposeful or wilful discriminatory intent is a prerequisite to liability under Section 1981; and (2) whether the scope of the hiring order and the relief afforded by the District Court is appropriate in view of the scope of the class represented by Plaintiffs and in view of statute of limitations considerations.

It appears to Plaintiffs that the second issue is not properly before the Supreme Court. This is the case because the Ninth Circuit Court of Appeals already has ruled that the case should be remanded to the District Court for a re-evaluation of the hiring order. 566 F.2d at 1343.

SUMMARY OF ARGUMENT

Plaintiffs' position before the Court is that the relief afforded below was entirely appropriate as "mirroring" the wrongs committed because intentional discrimination need not be proven to establish liability under Section 1981. The first reason that intended or wilful discrimination is not a prerequisite to liability under Section 1981 is that in *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975) this Court held that Title VII and Section 1981 are "directed to most of the same ends" and in *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971), this Court ruled that unintentional "artificial barriers" to minority employment are violative of Title VII. The second reason that intentional discrimination is not a prerequisite to liability under Section 1981 is that, as this Court recognized in *Griggs, Id.* at 430-31, as of 1964 Congress had declared that unintentional discrimination was prohibited in the employment field and, therefore, as of 1964 under the *in pari materia* canon of statutory construction, the non-intent standard became applicable to Section 1981. (See Point "I" of Argument, *infra*.)

At Point "II", *infra*, of the Argument, Plaintiffs also show that the record below is replete with evidence of intentional discrimination.

It also is Plaintiffs' position that the goals and timetables established in the District Court's hiring order are completely appropriate because: (a) other than due to an oversight which can and should be readily corrected on remand, Plaintiffs had standing to challenge Defendants' past discriminatory practices; (b) Defendants' statute of limitations arguments are inapplicable to this suit in equity; and (c) the goals and timetables found in the District Court's Judgment are appropriate for the purpose of eliminating the effects of past discrimination. (See Points "III" and "IV" of Argument, *infra*.)

ARGUMENT

I

WILFUL DISCRIMINATORY INTENT NEED NOT BE SHOWN UNDER SECTION 1981

A. Introduction

The principal thrust of Defendants' petition to the Supreme Court is that because the District Court found that Defendants had no wilful or conscious discriminatory intent (R. 162), and because no discrimination was *effectuated* (as opposed to "threatened") by Defendants after March, 1972 (when Title VII first became applicable to public entities), and because the relief afforded by the District Court was designed "to erase the effects of past discrimination" (566 F.2d at 1343; R. 164), no hiring order whatsoever can possibly be appropriate in this case assuming that wilful or purposeful discrimination is required to make out a violation of Section 1981.

In response, Plaintiffs' basic position is that wilful or purposeful discrimination is not required for a showing of liability in *employment discrimination cases* brought under Section 1981. In short, it is Plaintiffs' position that in lawsuits brought to enforce the right to make *employment* contracts guaranteed by Section 1981, Title VII standards as enunciated by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) are applicable.

The arguments in support of Plaintiffs' position that no wilful or purposeful discrimination need be proven under Section 1981 can be outlined as follows:

1. The Supreme Court has ruled unequivocally in *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975) that Title VII and Section 1981 are "related, and . . . directed to most of the same ends". Since the two statutes are directed to "most of the same ends", it follows that the

most basic standards of liability in the two statutes must be identical.

2. Since Title VII and Section 1981 overlap in their coverage of employment discrimination, according to the long-established *in pari materia* canon of statutory construction, the standards of liability under the two statutes should be construed consistently. The relevant policy considerations militate in favor of applying consistent standards of liability to Title VII and Section 1981.

3. A careful reading of this Court's decision in *Washington v. Davis*, 426 U.S. 229 (1976) shows that in that decision a non-intent standard was applied by the Court to a Section 1981 employment discrimination case. Further, the policy considerations relevant to the *Washington v. Davis* holding that purposeful intent must be shown to make out a violation of the Fifth and Fourteenth Amendments are not applicable to Section 1981.

4. The legislative history of Section 1981 shows that Congress intended the enactment to afford "practical freedom." In modern times, an intent standard would be inconsistent with this Congressional desire; indeed this Court has recognized that an intent standard in the employment field would result in legislation with no practical value.

5. No prejudice due to surprise or reliance will result to Defendants and other employers if a non-intent standard is applied to Section 1981. This is the case because of the fact the Courts of Appeals for almost a decade have continuously applied Title VII principles in Section 1981 cases; furthermore Defendants in the instant case believed Title VII to apply to their employment practices long before Title VII became applicable to public employers. By contrast severe prejudice due to

reliance will result to employment discrimination grievants if an intent standard is applied to Section 1981.

6. Application of a non-intent standard in Section 1981 cases would not constitute a retroactive application of Title VII.

B. Johnson v. Railway Express

The holding in the instant case by the Ninth Circuit Court of Appeals that Title VII standards for liability apply in Section 1981 employment discrimination cases is in accord with the Supreme Court's decision in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). Here Mr. Justice Blackman, speaking for the Court, ruled as follows at 421 U.S. 459 and 461:

"Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief. '[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.' *Alexander v. Gardner-Denver Co.* 415 U.S. at 48, 39 L. Ed. 2d 147, 94 S. Ct. 1011. In particular, Congress noted 'that the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. §1981; and that the two procedures augment each other and are not mutually exclusive.' H.R. Rep. No. 92-238, p. 19 (1971). See also S. Rep. No. 92-415, p. 24 (1971).

* * *

"We generally conclude, therefore, that the remedies available under Title VII and under §1981, *although related, and although directed to most of the same ends*, are separate, distinct, and independent." (emphasis added).

Plaintiffs submit that since the "remedies available" under Title VII and that part of Section 1981 which covers employment discrimination are "co-extensive," "related, and . . . directed to most of the same ends," it follows that the basic standard of liability, *i.e.*, whether purposeful intent to discriminate is required, must be the same or at least similar under both statutes. In other words, Plaintiffs submit that this Court already has ruled that although some minor differences between the two statutes were contemplated by Congress (*e.g.*, different limitations periods and the availability of punitive damages), the two statutes are basically the same. A holding that a radically different standard of liability is applicable to the two statutes would be completely inconsistent with the holding in *Johnson v. Railway Express*.

It cannot be contended that the above-quoted holding in *Johnson* is merely a holding that the "relief" principles under the two statutes are the same. When Mr. Justice Blackman spoke of the "remedies available" under the two statutes being "directed to most of the same ends", he was doing so in the context of a general discussion of the import and meaning of the two statutes. Therefore, the holding that the "remedies available" under the two statutes are "co-extensive" and "directed to most of the same ends", is a holding that both statutes are directed at remedying "most of" the

same wrongs. Perhaps another way of stating the same point is to point out that the only way the "remedies available" under the two statutes can be "co-extensive" is to have the same basic standards of liability under both statutes; otherwise the "remedies available" are not "co-extensive" since many wrongs would not be remedied under Section 1981 if an intent standard of liability were to be imposed while a non-intent standard is applicable to Title VII.

Plaintiffs believe it to be most noteworthy that at the time Congress stated that the "remedies available" under Title VII and Section 1981 are "co-extensive", Congress was aware that in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court had ruled that purposeful or wilful discrimination need not be proven under Title VII. Indeed *Griggs* was cited and the non-intent standard was discussed at pages 21 and 22 of H.R. Rep. No. 92-238 (1971), which is only two pages subsequent to the House Report expression of the Congressional will that the two statutes are "co-extensive."

Public policy considerations militate in favor of following the thrust of *Johnson v. Railway Express Agency* and making the remedies available under Title VII and Section 1981 truly "co-extensive" by applying the Title VII non-intent standard to Section 1981. In fact, it appears to Plaintiffs that if the intent standard proposed by Defendants is incorporated into Section 1981, in reality the holding would constitute the "death knell" of most important employment discrimination litigation under Section 1981. This is the case because as this Court recognized in the reference to the fox and stork

parable in *Griggs v. Duke Power Co.*, 401 U.S. at 431-32, legislation prohibiting employment discrimination would be of no real value to minorities if the only employment discrimination prohibited is intentional discrimination and if "built-in headwinds" for minority groups [which] are unrelated to measuring job capability" are to be allowed to continue to exist.⁴ Plaintiffs submit that to make Section 1981 a virtually valueless statute would hardly be consistent with the Court's ruling in *Johnson v. Railway Express Agency* that it is in the public interest to afford "remedies" in the two statutes which are "directed to most of the same ends". *Id.* at 461.

Since Title VII is in full force and effect and currently available to all employment discrimination grievants, it might "at first blush" seem that there is no practical need to follow *Johnson v. Railway Express* and make the remedies available under Section 1981 truly co-extensive with Title VII.

There are a great many practical considerations militating in favor of retaining Section 1981 as a meaningful alternative to Title VII, including:

(a) As this Court recognized in *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975), the "choice" to employment discrimination grievants of whether to proceed under the Title VII administrative route or to proceed directly to Federal Court under Section 1981 "is a valuable one". The instant case is an example of

⁴As early as 1969 the commentators recognized that unintentional discrimination is "a critical factor in minority unemployment and underemployment." Cooper & Sobol, "Fair Employment Criteria", 82 Harvard Law Review 1598, 1599 (1969). Another more recent commentator, perhaps overstating the case, has said that overt discrimination is now "virtually extinct." Lopatka, "Federal Regulation of Employment Discrimination", 1977 University of Illinois Law Forum 69, 71.

where the usual administrative delays under Title VII would have been severely prejudicial to the Plaintiffs and the represented class had they not been able to proceed directly to Federal Court under Section 1981.⁵ The availability of relief by way of preliminary injunction is much more likely to be available under Section 1981 than under Title VII.

(b) The extremely short statute of limitations found at Section 706(e) of Title VII for filing charges with the EEOC often means that the only cause of action a grievant may have preserved is under Section 1981. The availability of a longer statute of limitations in the non-intentional discrimination situation is important because the victim of such discrimination may not be immediately aware of the wrongs committed.

(c) For public employers such as Defendants, who were not covered by Title VII until March, 1972, unless a non-intent standard is applied to Section 1981, meaningful relief would not be available for discriminatory practices carried out subsequent to 1964 when the non-intent standard was first recognized by Congress, but prior to March, 1972, despite the fact those practices may have operated to exclude minorities totally as in the instant case.

(d) Title VII requires claimants to negotiate a complex administrative scheme before proceeding in Federal Court and claimants normally are not

⁵In the instant case the first complaint filed on January 11, 1973 was not based on Title VII (R. 1). It was not until May, 1973 that Title VII allegations were made by way of a Second Amended Complaint (R. 60), after the requisite Title VII administrative procedures had been exhausted. As noted above, it was the First Complaint which triggered Defendants' alteration of their discriminatory hiring program.

represented by counsel in these administrative proceedings. For example, under Section 706(c) of Title VII if a claimant fails to file his grievance with an appropriate State agency and the EEOC fails to "defer" his charge to such an agency, the Federal Courts do not have jurisdiction in a subsequent action under Title VII. If Section 1981 is preserved, with a non-intent standard, under such circumstances Section 1981 can serve as a "fall back" when defects arise in the Title VII procedures.

The consequences of a holding that purposeful discrimination is necessary to make out a Section 1981 violation can be graphically illustrated in the instant case. In the instant case if an intent standard is applied to Section 1981, there might be no significant remedial relief despite the following facts: (a) until this lawsuit was brought the Los Angeles County Fire Department employed virtually *no* blacks (one-half of one percent) and very few Mexican-Americans (2.8%) despite the fact there is a large black and Mexican-American population in Los Angeles County (R. 163); (b) the District Court found that "[d]efendants did not justify, at the trial or other proceedings herein, the paucity of black and Mexican-American firemen employees at the Los Angeles County Fire Department . . ." (R. 163); (c) the District Court recognized that even after the effective date of Title VII and "until learning that this lawsuit was about to be commenced" Defendants were continuing to utilize written tests which were artificial barriers and which operated to exclude minorities from employment (R. 163); (d) as discussed above in the "Statement of the Case", Section "B", Defendants were acutely aware that their employment practices operated to exclude minorities and were artificial barriers (See attached Appendix

"A", p. 3), but nevertheless continued to utilize the artificial barriers; and (e) the District Court found it to be in the "public interest" to enter a hiring order which would "accelerate the elimination of the racial imbalance . . . caused by the past discrimination of Defendants" (R. 161).

Defendants' arguments regarding public policy found in their memorandum at Section "III", to the effect that Plaintiffs' position would encourage a bypassing of the Title VII administrative procedures, misses a basic point. That point is that this Court already has recognized that it is consistent with public policy and the intent of Congress to provide Plaintiffs in employment discrimination cases with "alternative means" for redressing employment discrimination grievances. *Johnson v. Railway Express Agency, supra*, at 459, 461.

C. In Pari Materia

Concerning Plaintiffs' contention that the canon of statutory construction known as *in pari materia* should be applied to Title VII and Section 1981, two preliminary points must be made. The first is that when this Court held in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) that lack of intent to discriminate is irrelevant to liability in a Title VII case, it was made clear that the Court was applying a term or provision of Title VII "plain from the language of the statute". *Id.*, at 429-30. The second point is that this Court's holding in *Johnson v. Railway Express Agency* that discrimination in employment is prohibited by Section 1981 means, of course, that Title VII and Section 1981 are overlapping in their coverage and deal with the same subject matter, namely employment discrimination.

With these two points in mind, it is most important to note that it is a long-established canon of statutory

construction that when "several Acts of Congress [deal] with the same subject matter, [they] should be construed not only as expressing the intention of Congress at the dates the several acts were passed, but the later Acts should also be regarded as legislative interpretations of the prior ones." *Cope v. Cope*, 137 U.S. 682, 688-89 (1890).

Similarly more than a century ago the Supreme Court held as follows in *United States v. Freeman*, 3 How. 556, 564-65 (1845):

"The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts in *pari materia* are to be taken together, as if they were one law. (Doug., 30; 2 Term. Rep., 387, 586; 4 Maule & Selw., 210.) If a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute (Lord Raym., 1028); and if it can be gathered from a subsequent statute in *pari materia*, what meaning the Legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. (Morris v. Mellin, 6 Barn. & Cress., 454; 7 Barn. & Cress., 99.)" (Emphasis added).

Other more recent cases following the *in pari materia* canon of statutory construction include *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 193-94 (1967) and *NLRB v. Driver's Local Union*, 362 U.S. 274, 291-92 (1960) ("Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit."). Similarly in

Erlenbaugh v. United States, 409 U.S. 239, 243 (1972) the principle was applied in a criminal law context. Here Mr. Justice Marshall, writing for the Court, indicated that it is not appropriate to apply the principle when the two statutes were not "intended to serve the same function". 409 U.S. at 245. In the situation now before this Court it has, of course, already been recognized by this Court that the two statutes "are directed to most of the same ends". *Johnson v. Railway Express Agency*, *supra* at 461.

This Court has applied the *in pari materia* principle in a case strikingly similar to the instant case. In *Hunter v. Erickson*, 393 U.S. 385, 388 (1969), the *in pari materia* canon was applied in such a way that a statutory provision found in the Civil Rights Act of 1968, Title VIII, 42 U.S.C. §§3601 *et seq.* ("Title VIII") was incorporated into 42 U.S.C. §1982 ("Section 1982"). This situation is, of course, virtually identical to the instant case because the juxtaposition of Title VIII and Section 1982 in *Hunter v. Erickson* is identical to the juxtaposition of Title VII and Section 1981 in the instant case. Indeed both Section 1981 and Section 1982 are part of the Civil Rights Act of 1866.

Mr. Justice White wrote the opinion for the Court in *Hunter v. Erickson*. Citing two cases for the *in pari materia* principle, he held that a provision in Title VIII must be applied to Section 1982 because the two statutes "should be read together". The legislative history of Title VII shows a Congressional desire for a similar "reading together" of Title VII and Section 1981 in such a way that the no-intent Title VII standard is part of Section 1981. Senator Harrison Williams, Senate Floor Manager for the bill which amended Title VII in 1972, and one of its original sponsors, specifically stated as follows during floor debate:

"The paramount national interest embodied in the elimination of employment discrimination is both an expression of congressional intent and judicial interpretation. While we have generally denounced employment discrimination, the courts, which have been in a better position to view the devastation which this type of discrimination wreaks upon our social framework, have been even more adamant. One need only read the recent decision by Mr. Chief Justice Burger in *Griggs* against Duke Power Co., to see the concern that the courts have. In describing the scope of the act the Court stated:

"The Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation."

"Accordingly, the courts have repeatedly proposed a multifaceted approach to employment discrimination, to bring to bear the full force of the law on this problem.

"The law against employment discrimination did not begin with Title VII and the EEOC, nor is it intended to end with it. The right of individuals to bring suits in Federal courts to redress individual acts of discrimination, including employment discrimination was first provided by the Civil Rights Acts of 1866 and 1871, 42 U.S.C. sections 1981, 1983. It was recently stated by the Supreme Court in the case of *Jones v. Mayer*, that these acts provide fundamental constitutional guarantees. *In any case, the courts have specifically held that Title VII and the Civil Rights Acts of 1866 and 1871 are not mutually exclusive, and must be read together to provide alternative means to redress individual grievances.*" Cong. Rec. 3371 (1972) (emphasis added).

It should be noted that in the above quote, Senator Williams evidenced a Congressional desire that Section 1981 and Title VII "provide alternative means" to redress employment discrimination grievances. Plaintiffs would point out that unless Title VII and Section 1981 both have a non-intent standard of liability, the only cases where "alternative means" of relief would be provided would be in the intentional discrimination situation. In view of the fact that in the debate quoted above, Senator Williams specifically endorsed the idea of "alternative means" to redress grievances, at exactly the same time he endorsed the *Griggs* non-intent Title VII standard, it cannot be seriously contended that the desire for "alternative means" to redress grievances was limited to cases of intentional or wilful discrimination.

Plaintiffs believe that the analysis set forth in the above-quoted statement by Senator Williams reflects the correct public policy considerations in the instant case. A reading of Section 1981 under which intent would be required for liability would not be consistent with the desired policy of affording "alternative means" to achieve what Senator Williams referred to as "the paramount national interest . . . in the elimination of employment discrimination." Cong. Rec. 3371 (1972). Nor would an intent standard for Section 1981 be consistent with this Court's recognition in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975), that employment discrimination is "an historic evil of national proportions."

Another very important public policy consideration militating in favor of applying the *in pari materia* canon to Title VII and Section 1981 is that to do otherwise undoubtedly will cause inconsistency, confusion and uncertainty in the law. This will be the case because if the two statutes are not to be "read together",

the result will be that what is legal under one statute may be illegal under the other and *vice versa*. For example in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 353-354 (1977), this Court recently ruled that due to the "bona fide seniority system" provision found at Section 703(h) of Title VII, an otherwise legitimate seniority system is not illegal despite the fact the system may perpetuate discrimination carried out prior to the effective date of Title VII. If the *in pari materia* principle is to be applied to Title VII and Section 1981, the holding in *Teamsters* would be incorporated into Section 1981. By contrast, however, if Defendants' position is accepted and if the two statutes are to have different standards, it would follow that the seniority system found legal under Title VII in *Teamsters* would be illegal under Section 1981; this is the case because the pre-1965 segregated seniority systems constituted purposeful discrimination and due to the fact Section 1981 does not contain Title VII's Section 703(h) "bona fide seniority system" exception.

Two Circuit Courts of Appeal already have dealt with the above-described situation and, without using the phrase "*in pari materia*", have incorporated Section 703(h) of Title VII into Section 1981. *Johnson v. Ryder Truck Lines, Inc.*, 575 F.2d 471 (4th Cir. 1978); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191-92, n. 37 (5th Cir. 1978). If the *in pari materia* canon is not to be applied to Title VII and Section 1981, the validity of these two Circuit Court holdings is at best doubtful, thereby causing confusion and uncertainty in the law despite a clear and specific ruling by this Court on the Section 703(h) point in *Teamsters*.

Defendants argue in their memorandum at Section "I.A." that Section 1981 should be read in congruence with Section 1982 and the other sections which original-

ly were part of the Civil Rights Act of 1866. Defendants then point out that in *Jones v. Mayer*, 392 U.S. 409 (1968) this Court ruled that: (a) Title VIII of the Civil Rights Act of 1968 did not "affect" Section 1982; and (b) that racially "motivated" housing discrimination is prohibited by Section 1982.

As to the fact that in *Jones* the Court held that the enactment of Title VIII "had no effect" upon Section 1982, Plaintiffs would note that this holding went only to the point that Title VIII did not repeal Section 1982. It cannot possibly be, as Defendants contend, that this Court meant in *Jones* that the *in pari materia* principle is not applicable to Title VIII and Section 1982 because in 1969, only one year after *Jones*, as discussed above this Court in *Hunter v. Erickson* applied the *in pari materia* principle to Title VIII and Section 1982.

As to the point that Section 1982 should be read consistently with Section 1981, by this argument Defendants misapply the *in pari materia* principle. This canon of statutory construction is not that different parts of a statute covering different subject matter areas are to have the same standards of liability; rather, as discussed fully above, the *in pari materia* canon requires consistent interpretations of different statutes covering the same subject matter in order to have consistency in the law.

Defendants vigorously contend at Part "II.B." of their Brief before the Court that if the Title VII non-intent standard is to be applied to Section 1981, it would constitute a retroactive application of Title VII. Defendants further argue that such a retroactive application of Title VII would be in violation of the Court's holdings in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) and in *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

Plaintiffs' response to this argument is that in the instant case Plaintiffs are not asking for a retroactive application of Title VII. Plaintiffs are asking only for a recognition, by way of application of the *in pari materia* principle, that by 1964 when Congress first enacted Title VII, prohibited discrimination in employment had come to include, among other things, the non-intentional erection of artificial barriers to minority employment. At least as of that date, the discrimination prohibited by Section 1981 should include non-intentional artificial barriers. There is thus no "retroactive" application of Title VII implicit in Plaintiffs' position, but only an application of the *in pari materia* principle as of 1964 when Congress defined prohibited employment discrimination to include non-wilful artificial barriers to minority employment.

D. *Washington v. Davis*

The principal thrust of Defendants' argument in their Memorandum to this Court is that *Washington v. Davis*, 426 U.S. 229 (1976) requires a holding that wilful or purposeful discriminatory intent must be shown to establish liability under Section 1981. It appears to Plaintiffs that this reliance upon *Washington v. Davis* is misplaced to the extent that in *Washington v. Davis* it was held, or at least assumed, that a non-intent standard applies to Section 1981. This is the case because a careful reading of the opinion in *Washington v. Davis* shows that:

(a) the decision in *Washington v. Davis* that purposeful discrimination is necessary to make out a violation, found in Part "II" of the *Washington v. Davis* opinion, is strictly limited to cases based on the equal protection provisions of the Fifth and Fourteenth Amendments and does not extend to cases grounded on statutes; and (b) in Part

"III" of the *Washington v. Davis* opinion, in which Section 1981 and a local District of Columbia statute are construed, this Court specifically interpreted and construed Section 1981 and in doing so placed the burden of proving "business necessity" upon employers sued under Section 1981 upon a mere statistical showing of adverse impact without a showing of purposeful discrimination.

A review of the procedural context in which *Washington v. Davis* reached the Court is helpful. In Part "I" of the Court's opinion, the procedural setting giving rise to the appeal is described at 426 U.S. 233-34 as follows:

"These practices [including the written test] were asserted to violate respondents' rights 'under the due process clause of the Fifth Amendment to the United States Constitution, under 42 U.S.C. §1981 and under D.C. Code §1-320.' * * * Respondents then filed a motion for partial summary judgment with respect to the recruiting phase of the case, seeking a declaration that the test administered to those applying to become police officers is 'unlawfully discriminatory and thereby is in violation of the due process clause of the Fifth Amendment. . . .' No issue under any statute or regulation was raised by the motion. The District of Columbia defendants, petitioners here, and the federal parties also filed motions for summary judgment with respect to the recruiting aspects of the case asserting that respondents were entitled to relief on neither constitutional nor statutory grounds." (Emphasis added; footnotes omitted.)

Part II of the Court's opinion is limited to a discussion of the issues involved in the respondent's motion which "rested on purely constitutional grounds. . . ." The Court premised its remarks in Part II by stating

that "We have never held that the *constitutional standard* for adjudicating claims of invidious racial discrimination is identical to the standard applicable under Title VII, and we decline to do so today." (emphasis added). After a long discussion of equal protection cases brought under the Fifth and Fourteenth Amendments and 42 U.S.C. §1983, this Court held that purposeful discrimination must be shown to establish a claim under the *constitutional* equal protection provisions. The Court, therefore, concluded as follows:

"Because the Court of Appeals erroneously applied the legal standard applicable to Title VII cases in resolving the *constitutional* issues before it, we reverse its judgment in respondents' favor." 426 U.S. at 238. (Emphasis added.)

* * *

"[I]t was error [for the Court of Appeals] to direct summary judgment for respondents based on the Fifth Amendment." 426 U.S. at 248.

In Part "III" of the *Washington v. Davis* decision, this Court then proceeded to discuss the issues involved in the *petitioners'* summary judgment motion that were not disposed of by its holding in Part "II." Thus, Part "III" deals exclusively with the issues concerning the statutory causes of action under Section 1981 and D.C. Code §1-320, the constitutional issues having been disposed of in Part "II." And, most importantly, in this Part "III" the Court applies the non-intent standard of Title VII, to wit: a mere statistical showing that an employment practice has an adverse impact upon a minority group shifts the burden to the employer to prove job-relatedness regardless of whether purposeful or wilful discrimination has been shown.

There can be no real question but that in Part "III" of the *Washington v. Davis* opinion, the Court

was construing Section 1981 along with a District of Columbia local code section. The second paragraph of Part "III" of the opinion specifically notes that the Defendant employer's motion for summary judgment (which is what was being discussed in Part "III") was based upon an argument that the written test at issue "complied with *all* applicable statutory . . . requirements; and they appear not to have disputed that under the statutes and regulations governing their conduct standards similar to those obtaining under Title VII had to be satisfied." (Emphasis added.) Since the Court in the first paragraph of Part "I" of the opinion specifically noted that the case was brought under Section 1981, and indeed in footnote two quoted Section 1981 in its entirety, and since the Court in Part "III" as quoted immediately above stated that it was construing "all applicable statutes" (plural, not singular), and since Title VII principles were applied by the Court in Part "III" of the *Washington v. Davis* opinion, it follows that this Court has adopted and applied Title VII principles while construing Section 1981. It is most noteworthy that the Title VII principle applied under Section 1981 in Part "III" of *Washington v. Davis* was the very principle at issue in this case—whether in the absence of purposeful discrimination the burden to prove job-relatedness shifts to the employer upon a showing of statistical adverse impact.

The instant case also is distinguishable from *Washington v. Davis* because the public policy considerations in that case which underlie the holding that purposeful discrimination must be shown to make out a constitutional violation, are not applicable to Section 1981. The policy considerations in *Washington v. Davis* were stated at 426 U.S. 248 to be that if the non-intent standard were applied to the Fifth and Fourteenth Amendments, it "would raise serious doubts about,

and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes. . . .” By contrast, if the *in pari materia* principle is applied to Title VII and Section 1981 no such result would occur because the Title VII non-intent standard would be applied only to that part of Section 1981 also covered by Title VII, namely employment contracts.

In *Washington v. Davis*, this Court was, of course, not in a position to apply the *in pari materia* principle, and thereby limit the application of the non-intent standard to employment cases arising under the Fifth and Fourteenth Amendments, because in *Washington v. Davis* Constitutional provisions were being construed and it would not have been appropriate to rule that Constitutional standards are to be “read together” with statutory standards or that Constitutional standards are to be altered by legislation.

Throughout Defendants’ brief, and particularly at Part “I.A.”, it is argued that since under *Washington v. Davis*, Constitutional standards require intentional discrimination, to impute a non-intent standard to Section 1981 is not appropriate because Section 1981 has its historical foundations in the Thirteenth and Fourteenth Amendments. In response plaintiffs would point out that it is settled law that Congress may enact legislation pursuant to the enforcement authority provided by the Thirteenth and Fourteenth Amendments, which may afford civil rights protections not precisely afforded by the Constitutional provisions themselves. See e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966). It is, of course, through operation of the *in pari materia* principle that Congress, in effect, has promulgated the non-intent standard for Section 1981.

At page 32 of Defendants’ brief, with accompanying footnote six, it is stated that since this Court’s decision in *Washington v. Davis*, “the majority” of the Circuit

and District Courts have imputed an intent standard into Section 1981. In their opposition to the petition for certiorari Plaintiffs already have analyzed in detail all of the Court of Appeals cases cited by Defendants in footnote six. That analysis does not bear repetition here, save to say that the analysis showed that in none of the Court of Appeals cases cited was it held that an intent standard is applicable to Section 1981 cases.

As against this total lack of authority at the Court of Appeals level in support of Defendants’ position, it is noteworthy that in addition to the Ninth Circuit in the instant case, since *Washington v. Davis* was decided three Circuits have held that Title VII principles are applicable in cases brought pursuant to Section 1981. *Kinsey v. First Regional Securities, Inc.*, 557 F.2d 830, 838, n. 22 (D.C. Cir. 1977); *Johnson v. Ryder Truck Lines, Inc.*, 575 F.2d 471 (4th Cir. 1978); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191-92, n. 37 (5th Cir. 1978).

E. Legislative History

Defendants contend in their memorandum before this Court, without citing any relevant Congressional debates or committee reports, that in 1866 when Congress enacted Section 1981, Congress could not possibly have had a non-intent standard in mind.

Plaintiffs would note that the legislative history of Section 1981 evidences a Congressional intention that Section 1981 should “secure to all persons within the United States *practical* freedom.” (emphasis added) *Congressional Globe*, 39th Congress, 1st Session 474 (1866) (Remarks of Senator Trumbull, author of Section 1981 and chairman of the Senate Judiciary Committee). The point is, of course, that as this Court noted in *Griggs*, as fully discussed above, the only

way to afford "practical freedom" in modern times in the field of employment discrimination is to apply a non-intent standard to artificial barriers to minority employment. *Griggs, supra*, 401 U.S. at 431. Indeed not to afford "practical freedom" by a non-intent standard in the employment field hardly would be consonant with this Court's recognition, while construing Section 1982 in *Sullivan v. Little Hunting Park*, 396 U.S. 229, 237 (1969) that the protection "meant to be afforded" by Section 1 of the Civil Rights Act of 1866 was "broad and sweeping [in] nature."

F. Reliance

If this Court accepts Plaintiffs' position and rules that the *Griggs* non-intent standard is applicable to employment cases brought under Section 1981, no employer will be prejudiced due to surprise. This is true because, simply enough, for almost a decade the Federal Courts consistently have held that Title VII principles generally are applicable in Section 1981 employment discrimination cases. See, e.g., *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *King v. Laborers International Union, Local No. 818*, 443 F.2d 273 (6th Cir. 1971); *Young v. I.T.T.*, 438 F.2d 757 (3rd Cir. 1971); *Shield Club v. City of Cleveland*, 538 F.2d 329 (6th Cir. 1976).

One of the ironies in the instant case is that the very Defendants involved long have assumed that a non-intent standard applied to Section 1981. This is the case because in 1971, well before Title VII applied to public entities, the head of the County of Los Angeles Personnel Department wrote the memorandum which was Plaintiffs' Exhibit 8 below and which is attached hereto as Appendix "A". This memo at page 3 shows beyond any real doubt that Defendants assumed that the *Griggs* non-intent standard was ap-

plicable to them despite the fact Title VII was not yet so applicable.

It also is noteworthy that a ruling for the Defendants in the instant case will result in prejudice to those employment discrimination plaintiffs who, upon reliance of cases such as those cited above, have considered it to be long-settled law that non-intent standards apply in Section 1981 cases. There undoubtedly are many such cases based on Section 1981 currently pending in the Federal Court system.

II

THE RECORD HERE SHOWS INTENTIONAL DISCRIMINATION

Should the Court disagree with the Plaintiffs' position immediately above in Section "I" of the Argument, Plaintiffs nevertheless are entitled to an affirmance. This is the case because there is no real doubt but that the record below shows Defendants had engaged in intentional and purposeful discrimination.

A proper analysis of the situation begins with the fact that at the time the District Court found as a fact that Defendants had not engaged in "wilful or conscious" discrimination (R. 162), the District Court believed the holding to be of no importance. This is clear because at Conclusion of Law No. 7, the District Court held that the only intent required in the case was an intent to use the non-job-related employment practices which had the "effect" of discriminating (R. 163-64). Indeed a colloquy during trial between Plaintiffs' counsel and the District Court Judge shows that, contrary to the finding that no "wilful or conscious" discrimination had been engaged in, the District Court assumed that such wilful discriminatory intent existed but believed that the existence of such intent

was of no significance. The colloquy, found at pages 112-13 of the trial transcript, reads as follows in relevant part:

"THE COURT: Mr. Hunt, I want to consider everything that might be relevant to the issue here concerned. But I can assure you I am not going to be impressed with proof that the fact that the fire department has a battalion chief, or whatever it is, that is myopic as far as reasons for giving a person a low rating are concerned, and whether or not [you] can relate that to the activities of this witness in trying to promote racial integration in the fire department.

"I am perfectly willing to assume that there are officials in the fire department who would take offense at such doings. But that has nothing to do with what this Court feels called upon to consider.

* * *

"THE COURT: *You don't have to present testimony to establish to this Court that there are people in the fire department who would not like to have a minority increase in the roll. There is no doubt about that.*" (emphasis added).

Under these circumstances Plaintiffs submit that the District Court's finding of no intentional discrimination by Defendants is of little meaning or value. This is particularly true since the record in the instant case is replete with evidence of intentional discrimination and as this Court recognized in *Washington v. Davis*, 426 U.S. 229, 242 (1976), "[n]ecessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts". Firstly, the statistics showing virtually *no* minority firefighters, despite a large minority population in Los Angeles County, raises an inference of purposeful discrimination. See *Cas-*

taneda v. Partida, 430 U.S. 482, 494-95 (1977). Defendants did nothing to rebut that inference of intentional discrimination.

Not only did Defendants not rebut the inference of intentional discrimination raised by the employment statistics, but indeed Chief Barlow of the County Fire Department admitted that he had his "personal suspicions" about "intentional foot-dragging". His testimony concerned the loss of a large number of application slips from minority applicants; Chief Barlow testified that his "personal suspicions" were that the slips had been lost "because of some *intentional* foot-dragging on the part of some fire department personnel, [due to] the thought of minorities being added to the fire department" (emphasis added) (Tr. 187-88).⁶

Other evidence of intentional discrimination in the record below concerns the fact that Defendants permitted white firefighters to bring their white friends and relatives into County fire stations in order to prepare and assist those friends and relatives in the County's application and testing process for the firefighter job. When, however, a Captain in the Fire Department began doing the same for minorities, he was ordered to cease his activities. Despite this occurrence, the practice of permitting white applicants on County premises to "practice" for the tests and interviews was allowed to continue after it had been ordered halted for minorities (Tr. 98-110).

It also is most noteworthy, as to whether there was intentional discrimination on the part of Defendants, that as is fully described in Section "B" of the "Statement of the Case" above, Defendants continued to use discriminatory non-job-related written tests de-

⁶Chief Barlow's complete testimony on this point is attached hereto as Appendix "B".

spite their express *knowledge* that such tests were illegal under Title VII and indeed their assumption that such tests were illegal under Section 1981 (See attached Appendix "A"). It also is most noteworthy that this use of discriminatory written tests continued until 1973 and ceased only due to the instant lawsuit, despite the knowledge of the head of the personnel department as early as prior to 1969 that Defendants' written tests excluded minorities disproportionately (Tr. 42-43) and despite the knowledge of that department head that the tests were not job-related as ranking devices (Tr. 55-56). In this vein it is most noteworthy that this Court held in *Washington v. Davis*, 426 U.S. 229, 241 that evidence of disproportionate impact is relevant under the intent standard of liability of the Fifth and Fourteenth Amendments. Plaintiffs submit that *knowing* use of non-job-related tests while knowing that they operate to exclude minorities, is tantamount to a purposeful "intent" to exclude minorities.

This Court should be aware that before the Ninth Circuit Court of Appeals, Plaintiffs contended that if an intent standard is to be imputed to Section 1981, Plaintiffs have satisfied that standard and that the finding by the District Court of no intentional discrimination was "clearly erroneous." (See Plaintiffs/Appellees' Brief In Opposition To Petition For Rehearing). The Ninth Circuit, of course, did not reach the point since it applied a non-intent standard to Section 1981.

III

THE DEFENDANTS' STANDING ARGUMENT IS NOT PROPERLY BEFORE THE COURT.

At point "V" of Defendants' brief before this Court, it is argued that because the Ninth Circuit Court of Appeals has ruled that the Plaintiffs lacked standing to represent past applicants, the hiring order below cannot possibly be appropriate since the hiring order in this case is one designed to "eliminate the effects of past discrimination. . . ." (R. 164). Defendants' logic seems to be that since *past* applicants were not represented in this lawsuit, relief to remedy the effects of *past* discrimination is not appropriate.

Plaintiffs have no real argument with the basic logic of Defendants' position. Defendants, however, in their argument have misstated the Ninth Circuit's ruling. The Ninth Circuit ruled only that because the *class* did not include past applicants, the Plaintiffs lacked standing to challenge a written test administered in 1969. The exact holding of the Ninth Circuit, found at 566 F.2d 1337, is as follows: "*In light of the fact that plaintiffs' class did not include any prior unsuccessful applicants, it follows that plaintiffs neither suffered nor were threatened with any injury in fact from the use of the 1969 examination.*" The Court of Appeals then ordered the case remanded for reconsideration by the District Court of the hiring order it had entered, in view of the various holdings it had made including, in particular, the holding as to standing. 566 F.2d 1343.

Plaintiffs submit that at this stage of the proceedings Defendants cannot complain about the District Court's

hiring order on standing grounds. The point is, simply enough, that the Court of Appeals already has ordered the District Court to reconsider the hiring order it issued in view of the Court of Appeals holding on standing; therefore, in effect, Defendants are appealing on a point on which they have prevailed.

Plaintiffs did not appeal from the Court of Appeals holding because, upon remand, it will be shown by Plaintiffs that the District Court's definition of the scope of the class to exclude past applicants was a mere oversight on the part of the District Court and the counsel involved. This is the situation because the evidence at trial was fully developed on behalf of past applicants (See, *e.g.*, the stipulations of fact in the Pre-Trial Order, R. 136ff and the testimony at Tr. 30-61). Indeed, the District Court's basic liability holdings and the relief afforded all were based on "past" discrimination (R. 160, 164). Under these circumstances, it is the intent of Plaintiffs, upon the remand, to correct the oversight in which past applicants were excluded from the represented class by way of a motion for reconsideration directed to the scope of the represented class. Once the oversight is corrected, the Ninth Circuit holding that the Plaintiffs have no standing no longer will be applicable.

It cannot be seriously questioned but that the failure to include past applicants in the represented class was a mere oversight. The original complaint was pled on behalf of a class including past applicants (R. 4, lines 21-24). The evidence went to past applicants (See, *e.g.*, R. 137ff). Indeed, in its first opinion dated October 20, 1976, the Ninth Circuit Court of Appeals, in the very first sentence of the opinion, mistakenly stated that past applicants were included in the represented class (See Appendix "B", p. 1 to Petition for Certiorari). Furthermore, at no point in this entire

case, prior to the petition for certiorari to this Court, did Defendants ever make the argument that Plaintiffs lacked standing due to the fact their class did not include past applicants.

Plaintiffs also would note in passing that once the remand is carried out to the District Court, it will be appropriate for the named Plaintiffs to represent past applicants as well as present and future applicants. This is the case because the written tests to which the named Plaintiffs were subjected are virtually identical to the earlier written tests (See Plaintiffs' Exhibits 4 and 5, the tests concerned), thus satisfying the commonality and typicality requirements of Rule 23 of the Federal Rules of Civil Procedure. Indeed, as this Court stated in *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 406 (1977): "We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present."

The cases which show that Plaintiffs as minority current applicants and minority current employees can represent past applicants, particularly where the challenged employment practices affecting the class are the same or similar to those affecting the named Plaintiffs, are too legion to cite but include: *Gibson v. Local 40, Supercargoes and Checkers*, 543 F.2d 1259, 1264 (9th Cir. 1976); *Rich v. Martin Marietta Corporation*, 522 F.2d 333, 341 (10th Cir. 1975) (Plaintiffs allowed to make claims on behalf of a class including persons not engaged in work "identical" to that of the named Plaintiffs); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124-25 (5th Cir. 1969) (discharged employee a proper class Plaintiff for a class to include applicants and employees); *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 547-48 (4th Cir.

1975); *Hackett v. McGuire Brothers, Inc.*, 445 F.2d 442 (3rd Cir. 1971); *Waters v. Heublein, Inc.*, 547 F.2d 466 (9th Cir. 1976), *cert. denied*, 433 U.S. 915 (1977) (employee Plaintiff has standing to represent applicant class); *Gray v. Greyhound Lines, East*, 545 F.2d 169 (D.C. Cir. 1976).

IV THE HIRING ORDER ISSUED BELOW WAS APPROPRIATE

Assuming that past applicants were included in the Plaintiff class, the hiring order entered by the District Court was properly within the Court's equitable remedial discretion. The hiring order is set forth in the Judgment and provides that Defendants shall hire 40% minority firefighters (R. 167). This hiring order was made strictly subject to the proviso that Defendants' hiring standards shall not be lowered (R. 168).

The hiring relief was considered by the District Court to be "necessary to overcome the presently existing effects of past discrimination within a reasonable period of time" (R. 161). The District Court based this hiring order upon its findings that: (1) Defendants failed to rebut the *prima facie* case of discrimination created by the severe disparity between the percentage of blacks (0.5%) and Mexican-Americans (2.8%) in the workforce of the Los Angeles County Fire Department and the percentage of blacks (10.8%) and Mexican-Americans (18.3%) in the general population of Los Angeles County (R. 160); and (2) Defendants had engaged in illegal employment practices by their use of unvalidated written tests that adversely affected black and Mexican-American applicants and by Defendants' failure adequately to recruit blacks and Mexican-Americans (R. 160).

This Court repeatedly has recognized that once a past constitutional or statutory violation has been estab-

lished, the District Courts have broad equitable discretion in fashioning relief. In *Louisiana v. United States*, 380 U.S. 145 (1965), it was stated that:

"We bear in mind that the Court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Id.* at 154.

The hiring relief ordered by the District Court is consistent with the judgment of this Court announced by Mr. Justice Powell in *Regents of the University of California v. Bakke*, U.S., 57 L.Ed.2d 750 (1978). Justice Powell stated at 57 L.Ed.2d 778-79 that:

"The courts of appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference. *E.g.*, *Bridgeport Guardians, Inc. v. Civil Service Commission*, 482 F. 2d 1333 (CA2 1973); *Carter v. Gallagher*, 452 F. 2d 315, modified on rehearing en banc, 452 F. 2d 327 (CA8 1972). Such preferences also have been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination. *E.g.*, *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (CA3), *cert. denied*, 404 U.S. 954 (1971); *Associated General Contractors of Massachusetts, Inc. v. Altschuler*, 490 F. 2d 9 (CA1 1973), *cert. denied*, 416 U.S. 957 (1974); cf. *Katzenbach v. Morgan*, 384 U.S. 641 (1966)." (footnotes omitted.)

The scope of the hiring relief also was well within the District Court's equitable discretion. The basic re-

straint on a District Court's discretion is that "the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 16 (1971). In the instant case, the hiring relief "mirrors" the past violations (i.e., for *prima facie* case finding) for it was designed to cause the representation of blacks and Mexican-Americans in Defendants' workforce to attain the level it would have reached but for the past discrimination.

Virtually identical hiring relief was endorsed by this Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). In *Teamsters*, the consent decree provided for prospective relief that was described as follows at 431 U.S. 330-331, n.4:

"The decree further provided that future job vacancies at any company terminal would be filled first '[b]y those persons who may be found by the court, if any, to be individual or class discriminatees suffering the present effects of past discrimination because of race or national origin prohibited by Title VII of the Civil Rights Act of 1964.' Any remaining vacancies could be filled by 'any other persons,' but *the company obligated itself to hire one Negro or Spanish-surnamed person for every white person hired at any terminal until the percentage of minority workers at that terminal equalled the percentage of minority group members in the population of the metropolitan area surrounding the terminal.*" (Emphasis added).

This Court then approved this hiring order in the consent decree as proper injunctive relief when it stated at 431 U.S. 361, n. 47 that:

"The federal courts have freely exercised their broad equitable discretion to devise prospective relief designed to assure that employers found to be in violation of §707(a) [of Title VII]

eliminate their discriminatory practices and the effect therefrom. * * * In this case prospective relief was incorporated in the parties' consent decree. See *supra*, at 330-1, n.4."

It is also significant to note that the hiring relief in the *Teamsters* consent decree was based upon findings analogous to those made by the District Court in the instant case. This Court in *Teamsters* held that a *prima facie* case of discrimination had been shown by the disparity between the representation of minorities in the company's workforce and that in the general population. 431 U.S. at 337, n.17. It also was concluded at 431 U.S. at 339, n. 20 that:

"[A]bsent explanation, it is ordinarily to be expected that non discrimination will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."

Finally, the prospective hiring relief is equitable in nature and hence, the scope of the relief should not be limited, as Defendants suggest, to remedying only the effects of past discriminatory acts within the statute of limitations period. As stated in *Holmberg v. Armbricht*, 327 U.S. 392, 396 (1946),

"Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair. See *Russell v. Todd*, *supra* (309 US at 289, 84 L ed 761, 60 S Ct 527).

* * *

"Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that 'laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.' *Gallihier v. Cadwell*, 145 US 368, 373, 36 L ed 738, 740, 12 S Ct 873. See *Southern P. Co. v. Bogert*, 250 US 483, 488, 489, 63 L ed 1099, 1106, 1107, 39 S Ct 533. And so, a suit in equity may lie though a comparable cause of action at law would be barred."

See also *Gardner v. Panama R. Co.*, 342 U.S. 29, 30-31 (1951); *Allen v. Amalgamated Transit Union, Local 788*, 544 F.2d 876 (8th Cir. 1977).

Defendants are in no way prejudiced by a prospective hiring order that remedies the effects of past illegal discrimination that took place prior to the three year statute of limitations period. Furthermore, the District Court's decree specifically subordinates the numerical hiring goals to the availability of qualified applicants and, in fact, allows Defendants to increase their qualification standards for employment of firefighters so long as such standards are job-related (R. 168). It, therefore, was proper for the District Court "to render a decree which will so far as possible eliminate the discriminatory effects of the past. . . ." *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

The relief found by this Court to be appropriate in school desegregation cases illustrates that statutes of limitations have not been used to limit the District Court's discretion, awarding broad and effective equitable relief in discrimination cases. For example, in *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971), the constitutional violation found

by the District Court was "locating schools in Negro residential areas and fixing the size of the schools to accommodate the needs of immediate neighborhoods," 402 U.S. 7. The relief granted by the District Court, and approved by this Court, involved a comprehensive plan to desegregate the entire school system. Clearly, the desegregation plan was intended to eliminate entirely the dual school system that had been created by discriminatory siting and assignment decisions over an extended period of time. It was not limited to eliminating the effect of discriminatory sitings and assignments within the statute of limitations period.

Conclusion

For the reasons stated above, Plaintiffs respectfully submit that the decision of the Ninth Circuit Court of Appeals in *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977) should be affirmed.

Dated: November 1, 1978

Respectfully submitted,

A. THOMAS HUNT,
TIMOTHY B. FLYNN,
Center for Law in the Public Interest,
WALTER COCHRAN-BOND,
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Attorneys for Respondents.

APPENDIX "A".

May 19, 1971

TO: Civil Service Commission

FROM: Gordon T. Nesvig

SUBJECT: POLICY ON THE USE OF PROMOTIONAL EXAMINATIONS ON TUESDAY, APRIL 6, 1971

On Tuesday, April 6, 1971, the Board of Supervisors passed a motion urging that the Civil Service Commission rescind the promotional examination for Fireman and give an open competitive examination instead. On Wednesday, April 7, 1971, the Civil Service Commission ordered the promotional examination for Fireman rescinded and indicated that the examination should be ordered on an open competitive basis.

After reviewing all of the evidence prepared by my staff, I still believe that the decision to give a promotional examination was appropriate. I would like to present the following information as a basis for influencing future policy decisions of the Commission regarding the County's Affirmative Action Program.

Section 19101 which was added to the Administrative Code on October 11, 1969, as a result of the Board's desire to provide equal employment opportunity provides not only for more intensive recruitment of minorities for County jobs, but also provides for upgrading the large number of minority employees who are dead-ended in first and second level jobs. This far-reaching personnel policy applies to all County employees. It should be made clear that in the implementation of the County's Affirmative Action Program we will in no way knowingly discriminate against any group. Our

program is designed to provide expanded opportunities for all County employees, with an emphasis on eliminating barriers to the promotion of minorities.

It has been a consistent County policy to give promotional examinations when adequate competition exists within the County service. This policy is based on a County Charter requirement and is fully detailed in Civil Service Commission Rule 8.05.

As part of our effort to implement the Board's Affirmative Action policies we have been reviewing all examinations to insure that we provide County employees their promotional rights in those cases where adequate competition exists within County service. A recent example of the application of this policy was the interdepartmental promotional examination for Apprentice positions. Although these examinations had previously been given on an open competitive basis, we felt that we were denying opportunities to existing employees with related experience within County service.

The Fireman examination is another example in which Civil Service Commission Rule 8.05 appears applicable. Although we may exhaust the competition for this class within County service after one or two promotional administrations of the examination, we believe that adequate competition now exists within County service to justify a promotional examination.

The large filing (5,000-10,000) anticipated on an open competitive Fireman examination would require the use of a written test or an alternative untested procedure to select out 600 of the applicants for the interview portion of this examination. A promotional examination would result in a filing of approximately

600 applicants and would preclude the need to use a testing device which may discriminate.

I request the Commission's continued approval to provide promotional examinations in all cases where Civil Service Commission Rule 8.05 is determined to be applicable, with a heavy emphasis on those classes which are currently underrepresented by minorities.

rb

FACT SHEET ON THE FIREMAN EXAMINATION

1. Of 1795 Firemen in Los Angeles County only 10 are Black, 40 Brown, and 1 Oriental.
2. A great deal of the alienation between minority residents and the Fire Department results from the lack of adequate representation of minorities in the fire service. The brick-throwing we have experienced at several fires not only presents a hazard to County Firemen but results in greater fire losses than would otherwise occur.
3. The current test for Fireman *does* discriminate against minorities. (Although we had over 407 Blacks applying for Fireman the last time this test was given, only four were within appointment range on the list and hired. Of 126 Chicanos, only 5 were within reach on the list and subsequently hired.)
4. A recent Federal Supreme Court decision on testing, Griggs et al v Duke Power Company, holds that this type of test is in violation of the Civil Rights Act of 1964.
5. The only alternative which we have thus far found to be a culturally fair way of selecting applicants for the interview portion of the Fireman exam

has been informally determined to be illegal by our County Counsel representative (Random Selection).

6. We are not staffed to interview all of the 5000 plus candidates whom we estimate will apply for Fireman on an open-competitive examination, and the alternative of using our existing written examination as an administrative device for selecting a group of applicants whom we can interview for the Fireman positions (approximately 600 applicants to be interviewed for 80 jobs) places us in the position of knowingly discriminating.
7. We have good reason to believe that adequate competition exists within the County Service for this class. A promotional examination would result in a filing of approximately 600 applicants all of whom could be interviewed.
8. Since 30 to 40% of the County applicants for this class would be minorities, we estimate that a promotional examination would result in approximately 25 minority hires out of a total of 80 new hires.

APPENDIX "B".

THE COURT: You heard Mr. Clady testify yesterday about his Herculean effort to get slips from various people saying "Please let me know when you're going to announce another test." He thinks he collected some 300.

Was this part of the program that you helped to develop?

THE WITNESS: Part. Yes, this was part of the program to accumulate.

THE COURT: He said he developed some 300 of those, turned them in, and found out that no slip, no notices were sent out until just about the eve of the cut-off time, and then as far as he knew, only half were sent out.

Can you evaluate that? Do you know whether or not that occurred?

THE WITNESS: When I was called and told this list of names was not utilized, I requested down through the people responsible within our hierarchy of working with this group, what happened to these names, because our position was that these names would be submitted to the personnel department and they would be utilized in the recruiting effort.

THE COURT: Do you know whether or not it was done?

THE WITNESS: To my knowledge there was a communication problem at this particular time, and that I was not satisfied with the fact that these lists of names were not handled properly in my estimation.

THE COURT: Did you know why they were not handled properly?

THE WITNESS: No, I don't.

THE COURT: Do you have any suspicion or inference that it might not have been handled properly because of some intentional foot-dragging on the part of some fire department personnel, the thought of minorities being added to the fire department?

THE WITNESS: I have my personal suspicions, yes, your Honor.

NOV 30 1978

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1978
No. 77-1553

COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS
OF THE COUNTY OF LOS ANGELES; and CIVIL SERV-
ICE COMMISSION OF THE COUNTY OF LOS ANGELES,

Petitioners,

vs.

VAN DAVIS, HERSEL CLADY and FRED VEGA, individu-
ally and on behalf of all others similarly situated, WILLIE C.
BURSEY, ELIJAH HARRIS, JAMES W. SMITH, WILLIAM
CLADY, STEPHEN HAYNES, JIMMIE ROY TUCKER,
LEON AUBRY, RONALD CRAWFORD, JAMES HEARD,
ALFRED R. BALTAZAR, OSBALDO A. AMPARAH, in-
dividually and on behalf of all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit.

**REPLY BRIEF FOR COUNTY OF
LOS ANGELES, et al., PETITIONERS.**

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COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS
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vs.

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ally and on behalf of all others similarly situated, WILLIE C.
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ALFRED R. BALTAZAR, OSBALDO A. AMPARAH, in-
dividually and on behalf of all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit.

**REPLY BRIEF FOR COUNTY OF
LOS ANGELES, et al., PETITIONERS.**

Introduction.

In this reply brief, the petitioners will respond to the following contentions that predominate in the briefs of the respondents and their *amici*.

1) The congressional intent, either in 1866 or with the passage of Title VII in 1964, was to establish liability under Sec. 1981 by a showing of racially disproportionate impact alone without proof of discriminatory purpose;

2) The quota order requiring 40% minority hiring until racial parity is achieved is appropriate and within the Court's jurisdiction under the established facts;

3) The petition for certiorari was improvidently granted;

4) The finding of the trial court that the petitioners did not purposefully discriminate was clearly erroneous and should be overturned by the Supreme Court.

Because there appears to be some confusion among the *amici* in support of the respondents on the facts in a motion in opposition to certification of the class as they bear on the issues of the case, a brief summary is necessary to place the issues in perspective. This case involves the validity of the petitioners' hiring practices prior to the effective date of Title VII, that is, under plaintiffs' Sec. 1981 cause of action, and the validity of the quota hiring order. It is recognized by all that no discriminatory hiring occurred subsequent to the effective date of Title VII. The only objectionable practice alleged as occurring after Title VII was the proposed, but totally unexecuted plan to fill critical vacancies by initially interviewing the top 544 applicants taking the written test, which, if carried out, may have had a disproportionate effect on minorities.

The trial court found that the petitioners had not intentionally discriminated against minorities; however, it imposed a quota hiring order because of petitioners' use of an unvalidated written exam having a disparate impact on minorities. The hiring order was intended to remedy presumed past discriminatory hiring (that is, prior to Title VII) and not assist the present applicants and plaintiffs, who, plaintiffs concede, were all hired and ranked in a nondiscriminatory manner.

Additionally, the respondents claim that their failure to seek relief on behalf of past applicants was through inadvertent clerical error and that the standing issue was not raised until the recent rehearing before circuit court. In point of fact, not only did respondents fail to sue on behalf of past applicants—their complaints alleging they were representing only present and future applicants—but most significantly, no past applicant was a named plaintiff. The ruling of this Court on standing in *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1975), is applicable to the instant case.

The respondents' statement that a standing issue was not raised until the rehearing before the circuit court is simply not correct. The plaintiffs initially raised the standing issue in their answer (A. 15) and again in a motion in opposition to certification of the class (C.T. 49). In petitioners' appeal to the circuit court, one of the primary grounds was the plaintiffs' lack of standing because no past applicant was a named plaintiff (Brief of Defendants, Appellees-Appellants, pp. 18-21). The respondents have represented they will seek in the trial court expansion of the class to include past applicants (Resp's. Br. 42). Petitioners, of course, assert that even if past applicants had been included, a violation of Sec. 1981 cannot be adjudged without a showing of discriminatory purpose.

I

Congress Did Not Intend Racially Disproportionate Impact Alone to Constitute a Violation of Sec. 1981, Either at the Time of Original Enactment or With the Passage of Title VII in 1964.

Respondents and their *amici*, in contending that the County of Los Angeles can be found in violation of Sec. 1981 merely by a showing of disproportionate

impact, adopt two approaches to the construction of Sec. 1981. Initially, it is contended that the 39th Congress intended at the time of enactment of Sec. 1981 that discriminatory intent was not necessary to establish a violation of the statute, nor did the 13th Amendment so require. It is further argued that even if the 39th Congress did not contemplate the disparate impact standards that have now derived from Title VII, Congress in enacting Title VII in 1964 intended to amend Sec. 1981 by implication to engraft such standards but only as to employment practices.

The first position contends too broadly. It is unsupported by the legislative history, and because it cannot be limited to employment practices, is contrary to the view of the Supreme Court in *Washington v. Davis* expressed thusly:

"A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the affluent white."

Washington v. Davis, 426 U.S. 229, 240.

The second position is flatly contrary to the expressed intent of Congress when they enacted Title VII.

A. Intent of the 39th Congress.

Considerable research and analysis has been provided the Court on the considerations before the 39th Congress at the time they enacted Sec. 1981. There is nothing, however, in the deliberations of Congress that

would compel the conclusion that the *Griggs* disparate impact criteria were within the contemplation of Congress when they enacted Sec. 1981, and that they intended the statute to invalidate official actions solely because they result in a racially disproportionate impact. Indeed, as the research of the *amici* has demonstrated, a substantial number of state laws enacted after the Civil War expressly discriminated against blacks solely because of their race.

While it is true that some of the "Black Codes" enacted in the early Reconstruction Era appeared neutral on their face, it was obvious to Congress as well as the military occupational government that these statutes were enacted with a purposeful discriminatory intent and were designed to place the newly freed blacks in a position subservient to their former masters. A statute or practice, neutral on its face, is nevertheless violative of Sec. 1981 and the Constitution if it is enacted with a racially discriminatory purpose, as this Court recently emphasized in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977). That circumstance, however, is not before the Court in the instant case as the trial court after reviewing and weighing the evidence expressly concluded that no discriminatory intent existed.

The fact that Congress could not have intended a *Griggs* standard at the time they enacted Sec. 1981 is apparent from the actions of the federal government in subsequent years when, with the evolution of the civil service system in the late 19th Century, various employment criteria were utilized by state and federal agencies which clearly would not pass muster under Title VII requirements.

In seeking to provide "practical freedom" to blacks, Congress in passing Sec. 1981 recognized that emancipation was meaningless without the legal right to contract, and to buy, sell and own real and personal property. It does not follow, however, that Congress had in mind concepts that evolved 100 years later under a uniquely designed employment discrimination statute. Under respondents' expanded view of Sec. 1981, neutrally phrased criminal statutes or vagrancy laws enacted without any intent to discriminate would today violate the statute if in operation they had a disparate impact on minorities.

The argument that Congress intended in the enactment of Sec. 1981 to provide "practical freedom" for blacks by application of a disparate impact standard of liability appears to be resolved by this Court in *Washington v. Davis* when it declined to extend the standard to non-employment contexts or unless expressly provided for by law. The argument that Congress intended to impose a disparate impact standard in 1866, if true, cannot be limited to employment cases as Sec. 1981 by its terms is far more sweeping in its compass. To adopt that argument would necessarily undercut the thrust of this Court's decision in *Washington v. Davis* and compel the conclusion that a broad range of public and private activity falling within the scope of Sec. 1981 is invalid simply because such activity may result in a disparate impact on minorities.

It is further urged that Congress intended in enacting Sec. 1981 to eliminate the "badges and incidents" of slavery, and that the minorities' failure to do well on certain tests is an unfortunate byproduct of their previous condition of slavery and subsequent discriminatory treatment. Such an argument suffers, however,

from the fact that it is limited to blacks who were the only minority held in slavery, whereas Sec. 1981 has been relied upon by other minorities (as is the case herein), as well as whites for relief from purposeful discrimination.

The 1866 Act was directed toward providing equal civil rights and under the law and insuring a neutral process, devoid of discriminatory intent. It was not intended to invalidate a neutral practice simply because it had a disproportionate impact.¹ *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948) is not inconsistent with *Washington v. Davis* and cannot, in any way, be interpreted to support respondents' position. In fact, the decision confirms the close relationship between Sec. 1981 and the 14th Amendment as equal protection statutes. The statute that was struck down in *Takahashi* was not at all neutral on its face as it specifically barred aliens from obtaining a California commercial fishing license. In addition to holding that the statute conflicted with federal supremacy in regulating immigration, the Supreme Court found that aliens were "persons" within the protection of Sec. 1981 and the 14th Amendment and that the state could not bar aliens from pursuing a certain occupation while permitting citizens to do so. In discussing the application of Sec. 1981

¹The Supreme Court recognized the close affinity between Sec. 1981 and the 14th Amendment in *Buchanan v. Warley*, 245 U.S. 60 (1917), and *Hurd v. Hodge*, 68 S.Ct. 847 (1948). The Court in noting in *Hurd* that Sec. 1981 and the 14th Amendment were expressions of the same general congressional policy, quoted from the remarks of Representative Thayer that the 14th Amendment was intended to incorporate "the principles of the civil rights bill (Act of 1866) which has recently become the law." *Hurd v. Hodge*, *supra* at 852, N.13. It is clear that Congress was contemplating the same standard of liability for both enactments.

and the 14th Amendment to the case, the majority stated:

"The protection of this section has been held to extend to aliens as well as to citizens. Consequently the section and the Fourteenth Amendment on which it rests in part protect 'all persons' against state legislation bearing unequally upon them either because of alienage or color. See *Hurd v. Hodge*, 334 U.S. 24, 68 S.Ct. Sec. 847. The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." *Id.*, at 419-420.

B. Effect of the 1964 Enactment of Title VII

Unlike many of their *amici*, the respondents do not lean heavily upon the theory that Congress in enacting Sec. 1981 intended to impose a disparate impact standard devoid of any intent requirement on all public and private actions cognizable under that section. Apparently recognizing that such a broad interpretation is unsupported by legislative history and would run counter to the concern expressed by the Court in *Washington v. Davis*, the respondents advance a more limited construction—to wit, that Sec. 1981 should be construed as to transpose Title VII's disparate impact standards only as to employment cases.

Their argument may be summarized as follows: Since Title VII and Sec. 1981 are both intended to proscribe discrimination, the statutes should be construed together. Thus, it is urged, that by applying the doctrine of *in pari materia* the Court should find that Congress in enacting Title VII in 1964 thereby extended Title

VII standards to the century-old predecessor Sec. 1981, but *only in the employment context*. Therefore, since the effective date of the 1964 Civil Rights Act (July 2, 1965), disparate impact is also the standard under Sec. 1981, and since the county's disproportionate hiring took place after 1965 but before March 24, 1972, liability can be sustained under Sec. 1981 despite the fact that the trial court found no discriminatory intent present.

There are substantial flaws in this line of reasoning. For one, there is simply no indication in the congressional debates attendant to the enactment of Title VII that Congress intended in any way to change the standard of liability under Sec. 1981. In fact, Congress recognized that Sec. 1981 was a separate and distinct statute that was not to be affected by Title VII (*Johnson v. Railway Express Agency*, 421 U.S. 454 (1975)). Congress could not have intended the conciliation and jurisdictional administrative and procedural requirements of Title VII, so laboriously and comprehensively debated, to be, at the same time, rendered circumventable by extending Title VII standards to Sec. 1981. Expansion of Title VII standards to Sec. 1981 should not be accomplished without the express action of Congress through the legislative process, where the representatives will have the full opportunity to debate and consider the impact and consequence of such action on Title VII procedures.

The terms of Sec. 1981 do not provide for separate or special treatment of employment cases, nor is there any language in the 1964 Civil Rights Act that would amend Sec. 1981 to selectively apply Title VII employment standards. The fact that the two statutes may be directed toward the same ends and thus, to a certain extent overlap in coverage, as is the case also with

the Constitution, does not provide the basis for a broad holding that in 1964 Congress intended to make substantive changes to liability standards under Sec. 1981.

The most fundamental error in respondents' hypothesis, however, is that it overlooks the fact that Congress in 1964 manifestly intended not to extend Title VII to public employers such as the petitioners, as the Act expressly excluded such employers from its coverage.² Because Congress did not intend to apply Title VII to public employers until 1972, it must follow that it did not desire to do so indirectly through Sec. 1981. Congress's express exclusion of public agencies from Title VII coverage disposes of the arguments urging the harmonizing of Sec. 1981 with Title VII rather than the Constitution and the 14th Amendment through the *in pari materia* doctrine, applying Title VII standards to Sec. 1981 through Sec. 1988, or that Congress in enacting Title VII determined what practices constituted a "badge or incident" of slavery. At least, as far as public employers are concerned, their express exclusion from Title VII coverage in 1964 rebuts the contention that Congress, at that time, intended to amend Sec. 1981 so as to keep pace with contemporary Title VII developments.

Expansion of the disparate impact standard beyond areas where it is already specifically made applicable by statute should not be done without legislative action. Sec. 1988 does not provide support for respondents' contention. Sec. 1988 provides that jurisdiction "shall be exercised and enforced in conformity with the laws of the United States . . . so far as the same is not con-

²As originally enacted in 1964, Title VII (42 U.S.C. §2000e (b)) provided "but such item does not include . . . a state or political subdivision of a state. . . ."

sistent with the Constitution and the laws of the United States . . .". Since prior to 1972, Title VII provided that it was inapplicable to public employers, the transposition of the disparate impact standards of Title VII to a Sec. 1981 suit against a public entity for acts occurring prior to 1972 would be inconsistent with the laws of the United States.

C. Effect on Decisions in *Teamsters* and *Hazelwood*.

The respondents suggest that the Court's ruling in *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977), upholding a bona fide seniority system under Title VII would be jeopardized by recognizing an intent standard under Sec. 1981. In fact, only a ruling that disparate impact Title VII standards do not apply to Sec. 1981, will preserve the distinction in the *Teamsters* and *Hazelwood* cases between pre- and post-Title VII hiring practices and the scope of remedies attendant to a Title VII violation.

Respondents err in claiming that unless Title VII standards are read into Sec. 1981, the BFOQ retirement exemption under Sec. 703(h) of Title VII will not be preserved as it can be challenged under Sec. 1981 because they were intentionally discriminatory. The respondents argue from a false premise; that is, that the Court intended under Sec. 703(h) to approve all seniority systems, even those that were purposely discriminatory. Nothing could be further from the truth.

The seniority system approved in *Teamsters* was not intentionally discriminatory—it was the hiring practices that were found to be intentionally discriminatory. In fact, the seniority system upheld was racially neutral, not created for discriminatory purposes but with a present discriminatory impact only because of previous hiring discrimination.

Respondents' error is made apparent by the plain language of the Sec. 703(h) exemption which by its terms is applicable only to bona fide seniority systems that "are not the result of an intention to discriminate because of race or national origin." *International Brotherhood of Teamsters v. U.S.*, 97 S.Ct. 1843. The Court noted in *Teamsters* that "the seniority system in this case is entirely bona fide. It applies equally to all races and ethnic groups. . . . It is conceded that the seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose." *Id.* at 1865.

There is simply no reason to extend Title VII standards to Sec. 1981 in order to preserve the legality of a bona fide seniority system.³ The recognition of an intent requirement under Sec. 1981 would suffice. If the system was created or administered with a discriminatory purpose, it should be struck down as it deserves, and this can be done under Sec. 1981 as well as Title VII.

II Quota Order.

It has been contended by a few of the *amici*, but not respondents, that the judgment and the quota hiring order are independently sustainable under Title VII.

³The 4th Circuit in *Johnson v. Ryder Truck Lines, Inc.*, 575 F.2d 471, while reaching the correct result, failed to note the factual distinction observed by this Court in *Teamsters* between previous discriminatory hiring and a neutral seniority system that had a disproportionate impact in application; that is, the distinction between deliberate discriminatory intent and mere disproportionate consequences. The circuit court was correct in finding that employment practices legal under Title VII could not be illegal under Sec. 1981, not because the Sec. 703(h) exemption has to be read into Sec. 1981, but because there was no discriminatory intent in the administration of the system.

These contentions are based on various theories such as bad reputation, existing racial imbalance, and the uneffectuated proposal to initially interview the top 544 candidates taking the 1971 examination. The contention is completely without merit.

Simply stated, the uneffectuated intent to interview the top 544 candidates did not rise to the level of a Title VII violation. More significantly, however, the unimplemented proposal and the presumed threat can afford no bases whatsoever for the sweeping quota order entered in this case as it bears no relationship to the wrong. As Judge Wallace in dissent noted, it neither aggravated nor perpetuated discrimination and plaintiffs conceded that it had no effects (A. 118).

The quota order requiring hiring in accordance with set numerical ratios until the entire department achieved racial parity was solely designed as a remedy for presumed past discriminatory practices occurring prior to the effective date in 1972 of Title VII, unrestricted in any way by the remoteness of the employment practices. Therefore, a finding of a violation of Sec. 1981 was an indispensable predicate to the quota remedy. A Title VII violation, as respondents concur, would not sustain the sweeping quota order imposed upon the petitioners. Even in the presence of a violation of Sec. 1981, the particular order entered in this case exceeded the extent of the violations proven, and was not in any way tailored to the wrong established.

The limitations of Section 703(j) are not restricted to racial imbalance caused only by nondiscriminatory practices occurring prior to Title VII (*Franks v. Bowman*, 424 U.S. 747 (1976)). Otherwise, an employer who discriminated prior to the effective date of Title VII

but who had not discriminated subsequently, would be subject to a quota order simply as a consequence of the racial imbalance in his work force. Even assuming a token Title VII violation because of petitioners' uneffected intent to initially interview the top 544 applicants taking the 1971 written exam, Section 703(j) would preclude the issuance of a quota order merely to cure the existing racial imbalance of the department.

The County challenged the respondents' attempts to obtain a sweeping quota hiring order from the inception of the lawsuit (see Defendants' Answer to Second Amended Complaint [C.T. 42], and Defendants' Trial Brief [C.T. 119]). It was one of the principal grounds upon which petitioners appealed the judgment to the circuit court. Moreover, representatives from the County Fire Department, as well as the County's Director of Personnel, testified that they opposed a quota hiring order because it would be inimical to the operations of the department.

The *amici* erroneously assume that the quota order imposed is sustainable solely under Title VII. The nature of an employer's reputation is not sufficient to constitute a violation of Title VII or justify a quota order. Under this theory of some *amici*, an employer who discriminated prior to the effective date of Title VII would apparently be subject to a quota order soon after that date simply because of a "bad reputation," even if he had not engaged in any subsequent discriminatory hiring.

It is improper to justify a quota order to correct racial imbalance by simply characterizing such imbalance as the "effect of past discrimination" or the result of a "bad reputation". Racial imbalance can exist quite

independently of any actions taken by an employer subsequent to the effective date of Title VII. Moreover, such a theory obliterates standing requirements or statute of limitations' considerations,⁴ as a plaintiff could merely point to an existing racial imbalance and trace it back to some past discriminatory practice no matter how remote in time, or ineffective as far as the individual plaintiff is concerned.

The quota hiring decree in *Teamsters* does not lend support to respondents' efforts to sustain the quota order in this case, as the order in *Teamsters* was part of a consent decree that was not challenged on appeal. In addition, it was predicated upon the finding of actionable discrimination which petitioners assert does not exist in the case at bar.

The respondents' arguments in support of the quota order overlook the fact that it is not merely the department that has been affected by such an order, but all present and future applicants who are not members of the ethnic group that are the beneficiaries of the numerical quotas. Applicants who are white or of other minority groups, have had their employment opportunities severely restricted solely because of their race, a circumstance which this Court most recently addressed. *Regents of the University of California v. Bakke*, 157 L.Ed.2d (1978).

⁴The fact that a quota is considered an equitable remedy does not justify ignoring statute of limitations and standing requirements, particularly when, as this case illustrates, the hiring preference benefits future black and Mexican-American applicants who have not been the victims of discrimination to the detriment of innocent non-minority applicants.

III

The Petition for Certiorari Was Not Improvidently Granted; The Case Should Be Retained for Resolution of Important Federal Issues.

A few *amici* and the Government have argued that the Court improvidently granted certiorari on either the Sec. 1981 or the quota issue, or both. At the same time, however, they stress the importance of the issues before the Court on certiorari.⁵ It is significant that the respondents have not raised these contentions as they recognize for the reasons set forth below, that the issues are ripe for consideration, the resolution of which affects not only the vital interests of the parties, but involve federal issues of extreme importance and ones of first impression. The argument that certiorari was improvidently granted misconstrues the facts, the holding of the circuit court, and more importantly, acts to compound confusion in the law by counselling unnecessary delay in the judicial resolution of a critical and paramount federal issue.

The circuit court emphatically held that Title VII standards are applicable to Sec. 1981 (A. 89), and that the defendants violated Sec. 1981 by utilizing an unvalidated test that had a disparate impact on minorities even though there was no purposeful intent to discriminate (A. 89-90). The opinion stated concisely,

"In summary, we believe the district court properly found the defendants' use of the 1972 written examination as a selective device, a violation of Sec. 1981."

⁵Lawyers' Committee for Civil Rights Under Law ("This case presents a narrow, but exceedingly important issue". A.C. Br. 6.)

Moreover, despite this lack of discriminatory intent, the Court also held that the pre-1972 use of the 5'7" height standard also violated Sec. 1981.

The Court's approval of the quota hiring order necessarily had to be predicated solely upon a Sec. 1981 violation theory because there was no discriminatory hiring after Title VII became effective to the County of Los Angeles. The Government correctly observed in their brief that the County of Los Angeles had not hired anyone on the basis of the discriminatory examination after the effective date of Title VII (Br. 9), stating,

"No one (including the plaintiffs) had actually suffered discriminatory treatment since the plaintiffs became applicants in October, 1971." (Br. 18).

Unlike many of the *amici* whose knowledge of the facts is limited by their lack of intimacy with the case, the respondents recognize the Sec. 1981 issue as being appropriately before the Court and pressing for resolution in order to determine both the validity of the quota order and the finding of liability. Moreover, the respondents agree that the quota order affirmed by the appellate court necessarily had to rely upon a finding that Sec. 1981 had been violated.

"Plaintiffs agree that the remedial hiring order herein was based upon a pattern and practice of discriminatory practices that were unlawful only under Sec. 1981, not Title VII." (Br. in Opp. 29).

* The quota order approved by the circuit court was entered clearly for the sole purpose of eradicating effects

of presumed past discrimination.⁶ Such discrimination, if any, could only have occurred when Sec. 1981, not Title VII, was applicable to petitioners. The Court further noted that relief under Title VII is directly applicable to Sec. 1981 and saw no reason to limit Sec. 1981 relief. Thus a justiciable controversy exists as to Sec. 1981 as well as the quota.

The circuit court's affirmance of the quota order (consistently challenged by the petitioners in all proceedings below) necessarily requires a determination of the validity of the finding of liability for pre-Title VII conduct under Sec. 1981. If purposeful intent is the standard under Sec. 1981, then under the findings of the trial court the petitioners have not violated that statute, and the circuit could had no alternative except to vacate the quota order, because it has been recognized by all that no discriminatory hiring has occurred after Title VII became effective. Despite petitioners' urging that the quota order exceeded the trial court's jurisdiction, the circuit court upheld the validity of the order merely remanding the case for reconsideration of precise numerical ratios (but not the ultimate goal of racial parity) in light of the court's rulings on height and standing, the clear implication being that not only was a quota order valid, but that the trial court could even increase the quota because of the ruling on height. The petitioners urged before the circuit court as well as the Supreme Court that any quota hiring order would be illegal in the absence of a violation of Sec. 1981. It is quite apparent, however,

⁶In their brief, the respondents state,

"Indeed, the district court's basic liability holdings and relief afforded all were based on 'past' discrimination." (R. Br. 42).

that the circuit court expressly approved the existing quota order, stating,

"We do not necessarily believe that a 1-1-3 ratio was incorrect." (A. 96),

and further,

"We believe the district court was wholly justified in deciding to impose affirmative hiring orders upon the defendants." (A. 97).

In Footnote 20 the circuit court stated that they did not read *United Air Lines v. Evans*, 431 U.S. 553 (1977), as in any way restricting the affirmative quota order. In *United Air Lines* this Court ruled that past discriminatory practices, not the subject of a timely complaint, were not independently actionable. This footnote to the majority opinion below indicates that the circuit court believed that a quota order could be issued to provide a remedy to past discriminatees, even those that had not timely filed claims or instituted a lawsuit, which on the facts of this case could only have occurred before Title VII became applicable to the petitioners.

The argument that consideration of the validity of the quota order under Sec. 1981 is not necessary because the order can be sustained under Title VII is simply not correct in light of the facts indicating no discriminatory hiring after the effective date of Title VII. Moreover, as the respondents agree, the circuit court approved the quota order based on a presumed violation of Sec. 1981. Thus, resolution of the appropriate standard of liability under Sec. 1981 is ripe for consideration and properly before the Court.

Remanding the case without review would delay resolution of a federal issue of great importance affect-

ing many pending cases involving public employers and deprive the parties of meaningful judicial review, particularly since the quota order continues to be operable. Any further delay in resolution of the legal issue only increases the period of time that hires are made pursuant to what petitioners contend is an illegal quota order in excess of the district court's jurisdiction, not only adversely affecting the County of Los Angeles as a public employer, but perhaps more significantly, those applicants not the beneficiaries of the quota order who are refused employment solely because of their race. If Sec. 1981 requires a showing of deliberate intent, the quota order has been utilized over the past five years to improperly exclude whites and others from employment.⁷

Another compelling reason for immediate resolution of the issues is broached by the representation in respondents' brief (p. 42) that they intend to seek leave of court to expand the class to include prior applicants; i.e., those that applied only when Sec. 1981 was applicable, and upon that basis preserve the quota hiring order (a suggestion also made by the Lawyers' Committee for Civil Rights as *amicus curiae*. [Br. 10, N.4]). This clearly indicates the ripeness of the Sec. 1981 issue for consideration.

⁷The NAACP in reliance on statements of fact that appear absolutely nowhere in the record, gratuitously advance the novel theory that the petitioners have not been hiring under compulsion of the quota order since it was entered in 1973. This contention is not only irrelevant to the issue of the validity of the quota order, but is simply not correct. The *amicus*' factual representation itself describes a quota when it states that all applicants are reduced down to three groups of whites, blacks and Mexican-Americans in exact proportion to the 1-1-3 hiring order (Br. 6).

One cannot leave this issue without comment upon the position of the Government. In their brief, the Government clearly recognized the lack of any discriminatory hiring subsequent to the effective date of Title VII and quite candidly observed that as of this moment the quota hiring order has become excessive, noting that the County's hiring record in the last 5½ years has been exemplary. None of the named plaintiffs had suffered discriminatory treatment since they became applicants in October, 1971, prior to the effective date of Title VII, and the Government indicates that the need for the quota order has now evaporated.

Nowhere does the Government suggest that they disagree with the petitioners' contention that Sec. 1981 requires a showing of discriminatory intent. While petitioners appreciate their recognition that the quota order is excessive, the Government's reason for vacating the order granting certiorari on the speculative basis that the Court below may terminate the order entirely, is an unrealistic as it is insubstantial. The trial court's order was to engage in preferential hiring of blacks and Mexican-Americans until racial parity was achieved with the general community. The circuit court approved this order, indicating only a desire for the trial court to reconsider the precise ratio of hiring, not the final mandate of racial parity for both groups. The Government position, however, does highlight the unfairness of such an order if petitioners are correct in their contention that Title VII standards are not applicable to actions under Sec. 1981.

Various *amici* have indicated the importance of the issues before the Court and the Government has professed a desire to see the law in this area clarified and to have the Court arrive at a correct construction

of Sec. 1981. Thus, the position of the Government in seeking to delay resolution of this issue is inexplicable.⁸ Recently, in other employment discrimination cases, the Government's contribution has been limited to suggesting that the Court delay resolution of the issues by declining or limiting review. Rather than take a position on the merits, the Government's efforts have been directed toward seeking delay premised on technical, and in the instant case, ill-conceived grounds. While they do not indicate which case would be appropriate to decide the Sec. 1981 issue, they intimate that two pending circuit court cases are not the ones (see Br. 20, N.12). It is submitted that such a position is unjustified in view of:

1) The need to resolve a pressing federal issue of great national importance, an issue upon which more and more lower courts are taking a position contrary to that of the Ninth Circuit,⁹ and

⁸This is particularly so because if disparate impact is the standard under Sec. 1981, then the federal government, as well as certain agencies exempt under Title VII, would have engaged in illegal employment practices by utilizing civil service exams having a disparate impact prior to 1972.

⁹Subsequent to the grant of certiorari, herein, the Fifth Circuit specifically held that a claimant under Sec. 1981 must show purposeful discrimination and that Title VII standards did not apply.

"PER CURIAM: Upon motion for rehearing a majority of the court agrees with Judge Clark's special concurring opinion. The opinion is accordingly modified to hold that under the teaching of *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), the named plaintiff and the class must make a showing of purposeful discrimination before casting the burden on the defendant to rebut the charge; that a claim under the Fourteenth Amendment, dealt with by the court in *Washington*, rather than under Title VII of the Equal Employment Opportunity Act." *Williams v. DeKalb County, et al.*, (5th C.A., Oct. 10, 1978) 18 EPD Cases ¶8646. Accord: *Guardians Assoc. v. Civil Service Commission*, U.S.D.C., SDNY (1977) recently reported in 18 FEP Cases 63.

2) The obvious prejudice not only to the parties, but to potential applicants resulting from refusal to adjudicate a pressing legal issue while a quota order remains in effect.

The Government's analysis of the status of the quota order is as faulty, as is their assumption that the judgment and quota order are independently sustainable under Title VII. As discussed earlier the quota order was imposed as a remedy for presumed past discrimination that could only have taken place when Sec. 1981, not Title VII, was applicable to petitioners. The Government admits that reliance on Sec. 1981 was necessary in the first decision of the circuit court (Br. 13) but, somehow, without a change in the facts they contend it is not necessary in the second decision. The contentions raised in the petition for certiorari involved the appropriateness of the remedy (quota order), as well as the standard for liability. The circuit court specifically approved the validity of a quota order in general in this case, as well as the specific one imposed by the district court.

IV

The Evidence Sustains the District Court's Finding of No Intentional Discrimination; the Issues of Law Must Be Resolved in Accordance With the Established Findings in the Record.

Respondents attempt to evade the findings below upon which certiorari was granted, and most inappropriately urge the Court to find that petitioners engaged in purposeful discrimination contrary to the findings of the trial court. Not only is there no justification in the record for such action, the attempt misconstrues the role of the nation's highest judicial tribunal: The

Court should resolve the issues relating to liability under §1981 and the validity of the quota order on the basis of the factual record established below which forms the predicate for resolution of the important federal issues before the Court.

The principle that the trial court is in the best position to weigh all evidence, and its findings should not be reversed unless clearly erroneous needs no elaboration. It is sufficient to point out that the finding of court went beyond merely holding that no discriminatory intent existed; but affirmatively found that "neither Defendants nor their officials engaged in employment practices with a willful or conscious purpose of excluding blacks and Mexican-Americans from employment at the Los Angeles County Fire Department (A. 41). In addition, the district court found, to the contrary, that petitioner had engaged in efforts to increase minority representation.

The respondents' references to the evidence below are highly selective, out of context, and misleading. The record is replete with evidence that commencing before the 1969 examination, the County made substantial and in many instances creative efforts to hire more minorities into the fire department. Using the written exam to eliminate only the lowest scoring 3% and choosing the interviewees by random selection was designed to maximize minority participation in the employment process. Unfortunately this effort resulted in a lawsuit which delayed hiring until the County was placed in desperate need for new firemen which prompted the proposal to initially interview the top 544 applicants (R.T. 70).

The respondents are incorrect in stating that the proposal was intended to eliminate from employment

consideration candidates falling below 544. There was no such intention as Judge Wallace noted in his dissenting opinion.¹⁰ The top 544 were to be initially interviewed only for the limited purpose of obtaining a number of recruits to alleviate the present personnel crises (R.T. 72). As events transpired, of course, every candidate was interviewed and no person was hired nor an eligibility list created as a consequence of the written examination. Mr. Nesvig's remarks referred to the proposal to interview the top 544 applicants, which never occurred and were merely a recognition that the written test so utilized would have a disproportionate impact upon minorities. The petitioners' affirmative action efforts, many of which preceded the 1969 examinations, included hiring a minority recruitment firm (R.T. 62), targeted minority advertising, including distribution of a brochure printed in Spanish (R.T. 63, 89), intensive recruiting limited to minority areas (R.T. 63), changes to the written examination to reduce disparate effect (R.T. 82), and contemplation of an examination limited to County employees where the minority representation was higher than that in the general population.

Conclusion.

The adverse consequences of transposing the unique Title VII disparate impact standards to §1981 appear overwhelming. It would contravene legislative intent, invite circumvention of the Title VII conciliation, jurisdictional and procedural requirements, and extend Title

¹⁰"These applicants were not to be ranked on the basis of the test results, however, and the interviews were not intended to eliminate the remaining applicants from consideration. The purpose was solely to expedite the rehiring of sufficient firemen to meet the immediate, urgent requirements of the fire department." (Dissent, Wallace J. A. 103).

VII standards to persons or agencies Congress intended to exempt. Moreover, it would apply Title VII retroactively to public agencies contrary to the stated statutory exclusion in the Act and undercut this Court's decisions in *Teamsters* and *Hazelwood* which recognized the clear distinction in treatment between pre- and post-Title VII hiring practices. Finally, unless the disparate impact standard is limited to employment cases under §1981 (a limitation that finds no support or justification in the legislative history or prior judicial construction of the statute) the statute could be applied to invalidate neutrally designed and free of racial motivation, tax, welfare regulatory and licensing statutes, simply because in operation they may be more burdensome to some minorities.

The recognition of a discriminatory intent standard for §1981 is in harmony with the standard applied under the Constitution, the 14th Amendment and §1982, and will comport with Congressional intent, provide a unifying rule consistent with judicial and statutory precedent, and preserve the integrity of Title VII procedures.

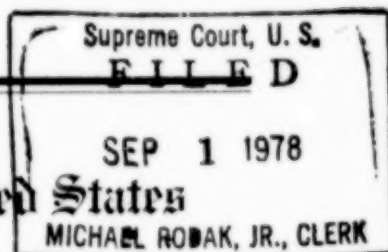
Respectfully submitted,

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November, 1978

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977



—
No. 77-1553

COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS OF
THE COUNTY OF LOS ANGELES; AND CIVIL SERVICE
COMMISSION OF THE COUNTY OF LOS ANGELES,
Petitioners,

v.

VAN DAVIS, HERSEL CLADY AND FRED VEGA, indi-
vidually and on behalf of all others similarly situ-
ated, WILLIE C. BURSEY, ELIJAH HARRIS, JAMES
W. SMITH, WILLIAM CLADY, STEPHEN HAYNES,
JIMMIE ROY TUCKER, LEON AUBRY, RONALD CRAW-
FORD, JAMES HEARD, ALFRED R. BALTAZAR, OSBALDO
A. AMPARAH, individually and on behalf of all
others similarly situated,

Respondents.

—
On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

—
**BRIEF AMICUS CURIAE OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL**

—
ROBERT E. WILLIAMS
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-1553

COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS OF
THE COUNTY OF LOS ANGELES; AND CIVIL SERVICE
COMMISSION OF THE COUNTY OF LOS ANGELES,
Petitioners,

v.

VAN DAVIS, HERSHEL CLADY AND FRED VEGA, indi-
vidually and on behalf of all others similarly situ-
ated, WILLIE C. BURSEY, ELIJAH HARRIS, JAMES
W. SMITH, WILLIAM CLADY, STEPHEN HAYNES,
JIMMIE ROY TUCKER, LEON AUBRY, RONALD CRAW-
FORD, JAMES HEARD, ALFRED R. BALTAZAR, OSBALDO
A. AMPARAH, individually and on behalf of all
others similarly situated,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL

INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* of the Equal Employment Advisory Council ("EEAC") is submitted pursuant to the written consent of all parties,¹ and in support of the petitioners. EEAC is a voluntary nonprofit association organized as a corporation under the laws of the District of Columbia to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations whose employer-members have a common interest in the foregoing purpose. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*) and 42 U.S.C. § 1981 as well as other equal employment statutes and regulations. As such, they have a direct interest in the issues presented for the Court's consideration in the instant case—i.e.,

¹ Their consents have been filed with the Clerk of the Court.

whether proof of a purposeful intent to discriminate is necessary to establish a violation of § 1981, and whether imposition of a racial hiring quota was an appropriate remedy.

Because of its interest in issues pertaining to equal employment, EEAC has sought and been granted permission by this Court to file briefs as *Amicus Curiae* in a number of other recent cases raising important related issues. See *e.g.*, *The Regents of the University of California v. Allan Bakke*, — U.S. —, 48 U.S.L.W. 4896 (1978); *Furnco Construction Corporation v. Waters*, — U.S. —, 46 U.S.L.W. 4966 (1978); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395 (1977); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); and *Gardner v. Westinghouse Broadcasting Company*, — U.S. —, 46 U.S.L.W. 4761 (1978).

STATEMENT OF THE CASE

As part of the selection process for entry-level firefighters, petitioner County of Los Angeles imposed a 5'7" height requirement on all applicants and, in August of 1969 and January of 1972, administered written verbal aptitude tests. On January 11, 1973, respondents herein filed a class action complaint on behalf of themselves and all present and future—but not past—black and Mexican-American applicants for positions as firemen alleging that petitioners had been guilty of racial discrimination in hiring in violation of: (1) the Fourteenth Amendment, (2) Title VII of the Civil Rights Act of 1964, and (3) 42 U.S.C. §§ 1981 and 1983.

The district court found that there existed a racial imbalance in the fire department resulting, at least in part, from the 1969 and 1972 use of unvalidated written tests having a disproportionate impact on minority applicants. The height requirement was determined to be "substantially and reasonably related to job performance as a fireman," and therefore valid. Without specifying which of the alleged constitutional and statutory provisions had been violated—and in spite of a finding that none of the petitioners had acted with "a willful or conscious purpose" of excluding minorities from employment—the district court imposed a hiring quota of one black and one Mexican-American applicant for every three white applicants until racial parity with the surrounding population was achieved.

The Ninth Circuit (Judge Wallace dissenting)² significantly pruned the scope of the district court's findings. Since no purposeful or intentional discrimination had been established, the Fourteenth Amendment and § 1983 violations were reversed on the basis of *Washington v. Davis*, 426 U.S. 229 (1976). The Court also reversed all violations pertaining to the 1969 test on the basis that since neither the individual claimants nor any members of the class had been adversely affected by that examination, they lacked standing to challenge its validity. Because the 1972 test was administered before Title VII became applicable to municipalities, and since the results of the test were never actually used

² *Van Davis, et al. v. County of Los Angeles, et al.*, 566 F.2d 1334 (C.A. 9 1977).

in the selection process,³ the Title VII violation predicated thereon was limited to the "continued threat" that the test might one day be used.

The Ninth Circuit did, however, affirm the § 1981 violations which were predicated upon the 1972 test and the height requirement. The court concluded that since these unvalidated selection devices had an adverse impact upon minorities, § 1981 violations had been established under the principles announced in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The court thus held that a *prima facie* case of employment discrimination under § 1981 could be established in the absence of an intent to discriminate.

The court of appeals also approved the imposition of a remedial hiring quota despite respondents' lack of standing to challenge practices predating their employment applications and despite their concession that all post-application selection procedures had been non-discriminatory. Moreover, the court did not disturb the district court's findings that petitioners (1) did not act with a "willful or conscious purpose of excluding [minorities] from employment," and (2) "did not interfere with affirmative action efforts of individual persons designed to increase [minority] participation rates in the work force." Nevertheless, the Ninth Circuit approved the imposition of a remedial hiring quota "to overcome the presently existing effects of past discrimination within a reasonable period of time"—effects which, by definition, were the

³ In an amended complaint respondents conceded that all post-1972 hiring was nondiscriminatory.

result of conduct—specific nature unproven—which predated the employment applications of all class members.

SUMMARY OF ARGUMENT

The Ninth Circuit's determination that a § 1981 violation can be established in the absence of an intent to discriminate is legally unsound and, as a practical matter, will seriously jeopardize efficient enforcement of the federal equal employment opportunity program.

Section 1981 was enacted, at least in part, to codify the equal protection clause of the Fourteenth Amendment. In contrast, Title VII is designed to supplement pre-existing judicial relief available under § 1981 and the Fourteenth Amendment with broad administrative relief against a wide range of employment discrimination practices. Given the correlative relationship between § 1981 and the Fourteenth Amendment—a relationship not shared with Title VII—the standard of proof for § 1981 claims should be consistent with that established for Fourteenth Amendment claims.

Section 1981, by guaranteeing to all persons “the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens” is fundamentally an equal protection statute. In *Washington v. Davis* this Court professed difficulty in understanding how a racially neutral qualification for employment—there, as here, an aptitude test—could violate equal protection guarantees “simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups.” 426 U.S. at 245. The Court observed that unsuccessful Negro applicants

had no greater claim to the denial of equal protection than did unsuccessful white applicants. Similarly in this case, white applicants who failed the 1972 examination were subject to the same disqualification from contracting with petitioners as were unsuccessful minority applicants. It cannot be said, therefore, that the minority applicants were denied “the same right” to contract as white applicants even assuming a higher minority failure rate.

Finally, applying the less stringent Title VII burden of proof to § 1981 claims would have the practical effect of undermining both this Court's decision in *Washington v. Davis* and the major goals sought to be accomplished by Congress through enactment of Title VII. In *Washington v. Davis*, this Court refused to apply the “disproportionate impact” standard of proof to equal protection claims for fear of jeopardizing “a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome on the poor and to the average black than to the more affluent white.” 426 U.S. at 248. Since the equal protection clause of the Fourteenth Amendment and § 1981 are substantively coextensive, the Ninth Circuit's ruling, simply guarantees through § 1981 claims the very result sought to be avoided by this Court in requiring a higher standard of proof for Fourteenth Amendment claims.

Similarly, Congress sought through enactment of Title VII to encourage the prompt and voluntary conciliation of employment discrimination claims. Accordingly, Title VII has a relatively short statute of limitations and mandates administrative conciliation efforts prior to commencement of suit. In contrast,

§ 1981 imposes no preconditions to suit and authorizes longer limitations periods. If the Ninth Circuit is correct that in terms of standards of proof "there remains no operational distinction . . . between liability based upon Title VII and § 1981," 566 F.2d at 1340, claimants will be able to defy Congressional desire and circumvent Title VII conciliation and limitation requirements simply by alleging § 1981 claims instead.

In any event, in view of the limited post-1971 violations which it found, "the Court of Appeals simply had no warrant . . . for imposing the system-wide remedy which it apparently did. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 417 (1977). The only violations seen by the Ninth Circuit were the County's *unfulfilled* decisions to use the 1972 written test as a selection device and to utilize the height requirement. As Judge Wallace pointed out, the respondents' conceded that "the post-March 1972 discrimination . . . had no 'effects'." 566 F.2d at 1352. In addition, the majority below ruled that none of the named or putative class members had standing to attack any employment practices predating their 1971 employment applications. As a result, the work force statistics upon which the Ninth Circuit predicated the quota necessarily were the result of pre-1971 hiring practices, since no firemen were hired thereafter until after the complaint was filed. These statistics bear no relevance to the violations found or the remedy imposed.

Lacking an appropriate violation upon which to base its remedy, the quota remedy was outside the court's equitable authority, *Milliken v. Bradley*, 418

U.S. 717, 744 (1974), and in contrast with the vast majority of courts which have viewed quotas as an extreme remedy which may only be imposed where no adequate relief can be obtained without their use. See e.g., *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420, 427 (2d Cir. 1975), *reh'g en banc denied*, 531 F.2d 5, *cert. denied*, 429 U.S. 823 (1976). Seen in this light, the remedial order below is at odds with this Court's prior ruling that an employer's hiring obligation "is [only] to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the workforce." *Furnco Construction Corp. v. Waters*, — U.S. —, 46 U.S.L.W. 4966, 4970 (1978) (Emphasis in original).

ARGUMENT

I. The Standard of Proof For § 1981 Claims Should Be The Fourteenth Amendment Purposeful Discrimination Standard Established In *Washington v. Davis* Rather Than The Title VII Disproportionate Impact Standard Announced In *Griggs v. Duke Power Co.*

In predicated a § 1981 violation upon the basis of a Title VII "disproportionate impact" finding alone, the Ninth Circuit has parted company with six other circuits which have either held or implied that the burden of proof under § 1981 is to be measured in accordance with the more stringent Fourteenth Amendment standard set forth in *Washington v. Davis*.⁴ Under that standard an employment practice

⁴ Third: *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 140-145 (3d Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3403 (U.S. Nov. 28, 1977) (No. 77-762); *Wade v. Mississippi*

is unlawful only if intentional or purposeful discrimination can be established. As shown below, there are sound legal and practical reasons for reversing the Ninth Circuit.

A. The Equal Protection Clause of the Fourteenth Amendment and § 1981 are Correlative Provisions Which Should Require the Same Standard of Proof.

In the course of interpreting § 1981⁵ this Court has on several occasions in recent years examined its con-

Cooperative Extension Service, 528 F.2d 508, 518 (5th Cir. 1976); Sixth: *Arnold v. Ballard*, — F.2d —, 12 EPD (CCH) par. 11,224 (6th Cir. 1976) (Upon remand, the district court specifically relied upon Judge Wallace's dissent herein. Memorandum Decision and Order, C73-478, Mar. 14, 1978); Seventh: *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977) (In absence of intent showing, all constitutional violations—including § 1981—reversed); Eighth: *Johnson v. Alexander*, 572 F.2d 1219, 1223 (8th Cir. 1978); Tenth: *Chicano Police Officers Assn. v. Stover*, 552 F.2d 918, 920 (10th Cir. 1977). See also *Lewis v. Bethlehem Steel Corp.*, 440 F. Supp. 949, 963 (D. Md. 1977); *Crocker v. Boeing Co.*, 437 F. Supp. 1138, 1181 (E.D. Pa. 1977); *Dickerson v. United States Steel Corp.*, slip op. p. 20, No. 73-1292 (E.D. Pa. August 2, 1978); *Veizaga v. National Board for Respiratory Therapy*, — F. Supp. —, 13 EPD (CCH) par. 11,525, p. 6881 (N. D. Ill. 1977); *Ortiz v. Bach*, — F. Supp. —, 14 FEP Cases 1019, 1021 (D. Col. 1977); But see *Kinsey v. First Regional Securities, Inc.*, 557 F.2d 830, 838, n.22 (D.C. Cir. 1977); *League v. City of Santa Ana*, 410 F. Supp. 873, 891-896 (C.D. Cal. 1976).

⁵ Section 1981, entitled "Equal Rights Under the Law," provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and

constitutional and legislative origins. See *Runyon v. McCrary*, 427 U.S. 160, 168-175 (1976); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 285-296 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-460 (1975); *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431, 439-440 (1973); cf. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 417-437 (1968). In *Runyon* concurring Justices Powell and Stevens and dissenting Justices White and Rehnquist expressed concern that § 1981 has in recent years been interpreted too broadly and in a manner which, in the words of Mr. Justice Stevens, "would have amazed the legislators who voted for it." 427 U.S. at 189. The decision of the Ninth Circuit herein, if permitted to stand, would further dislodge § 1981 from its constitutional and legislative roots.

In *Runyon*, this Court concluded that § 1981 flowed from both § 16 of the Voting Rights Act of 1870 [16 Stat. 144] and § 1 of the Civil Rights Act of 1866 [14 Stat. 27]. 427 U.S. at 169, n.8.⁶ It is instructive to examine both tributaries. As the Court

proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

⁶ Mr. Justice White in a dissent joined by Mr. Justice Rehnquist contended that § 1981 is derived from § 18 of the 1870 statute alone. It is unnecessary to resolve this conflict because, as indicated below, whether § 1981 is viewed as a product of both the 1866 and 1870 enactments, or of the 1870 enactment alone, the correlative nature of § 1981 and the equal protection clause of the Fourteenth Amendment is patent.

has noted on several occasions, "the operative language of both § 1981 and § 1982⁷ is traceable to the Act of April 9, 1966." *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. at 439; *Runyon v. McCrary*, 427 U.S. at 171.

Section 1 of the 1866 Act⁸ was enacted under sanction of the Thirteenth Amendment. *Buchanan v. Warley*, 245 U.S. 60, 78 (1917). According to Senator Trumbull, its author and principal Senate sponsor, the purpose of the Act was to "destroy the discrimination made against the Negro in the laws of the Southern States and to carry into effect the Thirteenth Amendment." H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 20-21 (1908). Immediately upon enactment, however, twin concerns devel-

⁷ Section 1982, "Property Rights," provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

⁸ Section 1 provided in pertinent part:

That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

oped that the statute was vulnerable to repeal by a subsequent Congress and that its application to the states was of questionable constitutionality.⁹ Within two months a joint resolution was drafted addressing these concerns. The resolution eventually became the Fourteenth Amendment. *United States v. Wong Kim Ark*, 169 U.S. 649, 675 (1898); *Hurd v. Hodge*, 334 U.S. 24, 32-33 (1948).

Courts and historians both have recognized that a major impetus behind enactment of the Fourteenth Amendment¹⁰ was a desire to preserve the rights created by § 1 of the 1866 Act. As stated by one historian, "virtually every speaker in the debates on the Fourteenth Amendment—Republican and Democrat alike—said or agreed that the Amendment was designed to embody or incorporate the Civil Rights Act." H. GRAHAM, *EVERYMAN'S CONSTITUTION* 291

⁹ This Court has expressed doubt that the aims of the 1866 Act could constitutionally be achieved under the Thirteenth Amendment exclusively. *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 476-477 (Harlan, J., dissenting), citing *Hodges v. United States*, 203 U.S. 1, 16-18 (1906); *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926). But cf. *Civil Rights Cases*, 109 U.S. 3, 22 (1883).

¹⁰ The Amendment provides in pertinent part:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(1968).¹¹ One author has astutely noted that the Amendment “was designed to ‘constitutionalize’ the Act, that is, to ‘embody’ it in the Constitution so as to remove doubt as to its constitutionality and to place it beyond the power of a later Congress to repeal.” R. BERGER, *GOVERNMENT BY JUDICIARY, THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 23 (1977) (Emphasis in original). These observations thus confirm the validity of this Court’s conclusion in *Hurd v. Hodge* that the 1866 Civil Rights Act and the Fourteenth Amendment were “expressions of the same general congressional policy.” 334 U.S. at 32.

Shortly after its constitutionalization through the Fourteenth Amendment, the 1866 Act was re-enacted in the Voting Rights Act of 1870. *Buchanan v. Warley*, 245 U.S. at 78; *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 422, n.28; *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. at 440, n.11. Two sections of the 1870 Act are relevant to our analysis. Section 18 simply re-enacted the 1866 Act in its entirety.¹² Section 16—the provision identified by the Court in *Runyon* as being one of the two primary sources of § 1981—is similar to, but not identical

¹¹ See also FLACK, *supra* at 81 (“[T]here seems to be little, if any, difference between the interpretation put upon the first section [of the Fourteenth Amendment] by the majority and the minority, for nearly all said that it was but an incorporation of the Civil Rights bill”).

¹² Section 18 provided in pertinent part:

That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted

with, § 1 of the 1866 Act.¹³ While the rights at issue in this case (i.e., the right to contract and the right to full and equal benefit of all laws) are preserved in identical fashion in all three provisions, § 16, unlike § 1 of the 1866 Act and § 18 of the 1870 Act, guarantees those rights to “all persons,” not merely “all citizens.”¹⁴ In spite of this slight modification, however, the scope of the 1866 Act was not altered by its 1870

¹³ Section 16 provided:

That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void.

It should be noted that the language relevant to this case which has been italicized is identical to language appearing in § 1 of the 1866 Act, Revised Statutes § 1977 (See n. 15, *infra*), and § 1981.

¹⁴ This Court has speculated that the first sentence of the Fourteenth Amendment—which grants United States citizenship to “all persons born or naturalized in the United States and subject to [its] jurisdiction”—may itself have been responsible for this change in language from the 1866 Act. *United States v. Wong Kim Ark*, 169 U.S. at 696; *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. at 440, n.11.

re-enactment, *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 436, and as stated in § 18 of the 1870 Act itself, § 16 was to be "enforced according to the provisions" of the 1866 Act. *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. at 439, n.11.

The constitutional basis of the 1866 and 1870 enactments was implicitly reaffirmed by this Court following the 1874 codification of § 16 of the 1870 Act into § 1977 of the Revised Statutes.¹⁰ *United States v. Wong Kim Ark*, 169 U.S. at 695; *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. at 439, n.11. In *Strauder v. West Virginia*, 100 U.S. 303, 312 (1879) the Court noted that § 1977 put "in the form of a statute what had been substantially ordained by the [Fourteenth] amendment. It was a step towards enforcing the constitutional provisions." Similarly, in *Buchanan v. Warley*, 245 U.S. at 79, § 1977 was described as a statute "enacted in furtherance of the [Fourteenth Amendment's] purpose." Revised Statutes § 1977 now appears as 42 U.S.C. § 1981.

As this developmental analysis reveals, § 1981 and the Fourteenth Amendment are correlative provisions

¹⁰ R.S. § 1977 provided that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other.

This is the precise language now codified as § 1981.

which share a common history and are expressive of the same congressional policies. The same may not be said, however, of § 1981 and Title VII. Those enactments, "although related, and although directed to most of the same ends," have nevertheless always been viewed as "separate, distinct and independent remedies for employment discrimination." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 461.¹⁶ This Court also noted in *Johnson* that § 1981 and Title VII are neither procedurally nor substantively coextensive and that Congress has, in fact, created "independent administrative and judicial remedies." *Id.*

In addition to providing alternative remedies, § 1981 and Title VII are fundamentally different statutes enacted to accomplish different objectives. As noted, § 1981 is a manifestation of Congressional desire under the Thirteenth and Fourteenth Amendments "to provide for equal protection of the laws to all persons." *Runyon v. McCrary*, 427 U.S. at 204 (White J., dissenting), citing *Gibson v. Mississippi*, 162 U.S. 565, 580 (1896) and *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). It thus creates a judicial remedy for private litigants who claim that they have

¹⁶ Congressional intent in establishing separate remedies was clearly reflected in the debates on the 1972 amendments to the Civil Rights Act of 1964 when a proposed amendment which would have deprived claimants of any right to sue under § 1981 was rejected on the strength of Senator Williams' observation that Title VII and the Civil Rights Acts of 1866 and 1870 afford "alternative means" for redressing employment discrimination, and that adoption of the proposed amendment would "repeal the first major piece of civil rights legislation in the Nation's history." 118 Cong. Rec. 3371-3373 (1972), cited in *Runyon v. McCrary*, 427 U.S. at 174, n.11.

been denied equal protection of the laws on account of race. In contrast, Title VII is predicated upon the power of Congress to regulate commerce,¹⁷ and is designed to eliminate discrimination in employment by prohibiting "all practices in whatever form which create inequality in employment opportunities due to discrimination on the basis of race, religion, sex or national origin." *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 763 (1976) (Emphasis added); cf. *Griggs v. Duke Power Co.*, 401 U.S. at 429-430; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

Section 1981 is thus broader than Title VII in one sense and narrower in another. Because its reach extends far beyond the area of discrimination in employment, it is a more inclusive statute than Title VII. However, to the extent that both provisions apply to employment discrimination Title VII is considerably broader—§ 1981 merely prohibits racial discrimination in employment contracting whereas Title VII encompasses "all practices in whatever form which create inequality in employment opportunity." *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. at 763. Accordingly, "[C]ongress clearly has re-

¹⁷ U.S. Const. Art. I, § 8, cl. 31. See 111 Cong. Rec. 7202-7212, 8453-8456 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 245-246 (1964). The extension of Title VII to governmental agencies in 1972, however, represented an exercise of congressional authority under § 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453, n.9 (1976).

tained § 1981 as a remedy against private discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII." *Johnson v. Railway Express Agency*, 421 U.S. at 466.¹⁸

In the past this Court has noted the extreme importance of distinctions such as these in evaluating claims that statutory standards are transferrable from one statutory scheme to another. For example, in *Washington v. Davis*, Mr. Justice Stevens, after noting that the parties had argued the case as though

¹⁸ Respondents are not aided by several cases holding that, in many situations, the substantive requirements of § 1981 and Title VII should be interpreted consistently to avoid imposing conflicting requirements upon employers. See e.g., *Chance v. Board of Examiners*, 534 F.2d 993, 998 (2d Cir. 1976), *mod. on other grounds*, 534 F.2d 1007, *cert. denied*, 431 U.S. 965 (1977); and *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1977); and *Waters v. Wisconsin Steel Works*, 502 F.2d 1309, 1316 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976). In those cases, the question of whether a showing of purposeful discrimination is required to establish any § 1981 violation was not addressed. Rather, the courts correctly concluded that employment practices which are not violative of Title VII should be immune from attack under § 1981. Those cases recognize that although both Title VII and § 1981 somewhat overlap regarding employment discrimination, Title VII focused on specific contemporary employment practices and provides "modern legislative history which is directly in point," as to which of these practices Congress intended either to permit or prohibit. See *Hinton v. Lee Way Motor Freight, Inc.*, 412 F. Supp. 625, 628-629 (W.D. Okla. 1975).

Title VII standards were automatically applicable to § 1981 and § 1-320 of the District of Columbia Code, cautioned that “there is sufficient individuality and complexity to [Title VII], and to the regulations promulgated under it, to make it inappropriate simply to transplant those standards in their entirety into a different statutory scheme having a different history.” 426 U.S. at 255. Similarly, in the course of analyzing whether § 1982¹⁹ prohibited racial discrimination in the private sale of real estate, the Court in *Jones v. Alfred H. Mayer Co.*, evaluated the possible impact on its decision of the recently-enacted fair housing title [Title VIII] of the Civil Rights Act of 1968. 42 U.S.C. § 3601 *et seq.* After noting that § 1982 would “stand independently” from Title VIII, the Court observed that there are:

[v]ast differences between, on the one hand, a general statute applicable only to racial discrimination in the rental and sale of property and enforceable only by private parties acting on their own initiative, and, on the other hand, a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority.

¹⁹ The text of § 1982 appears in n.7, *supra*. Sections 1981 and 1982 both originally appeared in § 1 of the 1866 Act and this Court has held that, “In light of the historical interrelationship between Sec. 1981 and Sec. 1982, there is no reason to construe these sections differently when applied [to private forms of discrimination].” *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. at 440, n.11.

392 U.S. at 417. This analysis was specifically relied upon by the Court in *Johnson v. Railway Express Agency*, as authority supportive of “the independence of the avenues of relief respectively available under Title VII and the older § 1981.” 421 U.S. at 460.

This historical comparison of the relationship between § 1981 and the Fourteenth Amendment on the one hand, and § 1981 and Title VII on the other, underscores the validity of the conclusion drawn by dissenting Judge Wallace below that:

[s]ection 1981 enjoys a unique historical and conceptual relationship to the Fourteenth Amendment which is not shared by Title VII . . . [and] that the standards for establishing a prima facie case of discrimination under section 1981 and the Equal Protection Clause of the Fourteenth Amendment should be the same: there must be proof of discriminatory intent.

566 F.2d at 1349. Judge Wallace’s analysis is fully supported by prior decisions of this Court. In *Hurd v. Hodge*, *supra*, the Court was asked to decide whether judicial enforcement of racially discriminatory real estate restrictive covenants by the courts of the District of Columbia violated Revised Statutes § 1978—the predecessor of § 1982.²⁰ After noting both the “close relationship between § 1 of the Civil Rights Act and the Fourteenth Amendment” and the holding in *Shelly v. Kramer*, 334 U.S. 1 (1948) that the *Fourteenth Amendment* forbids such discrimination where imposed by state courts in the enforcement of restrictive covenants, the Court concluded

²⁰ See n. 7 and 19, *supra*.

that the *Shelly v. Kramer* Fourteenth Amendment holding “is clearly indicative of the construction to be given the relevant provisions of the Civil Rights Act.” 334 U.S. at 33 (Emphasis added). In precisely the same fashion, given the “close relationship” between § 1 of the Civil Rights Act and the Fourteenth Amendment, this Court’s holding in *Washington v. Davis*, that purposeful discrimination must be shown to establish an unlawful employment practice under the Fourteenth Amendment “is clearly indicative of the construction to be given the relevant provisions [i.e., § 1981] of the Civil Rights Act.” *Id.* Such a determination would be consistent with traditional rules of statutory construction which require that every statute involving constitutional rights is to be read in light of the Constitution, and that “[t]he Constitution and the statute will be construed together as one law.” *Cincinnati, N.O. & T.P. R. Co. v. Kentucky*, 115 U.S. 321, 334 (1885); 16 Am Jur 2d, Const. Law § 144 (1964).

Only by applying the Fourteenth Amendment intent standard to § 1981 can the trend toward its interpretation as a “catch-all” discrimination provision be stemmed, and its original constitutional and legislative roots reaffirmed.

B. The Conclusion in *Washington v. Davis* That Disproportionate Impact Alone Does Not Constitute A Denial Of Equal Protection Is Dispositive Of The § 1981 Allegations In This Case.

The Fourteenth Amendment and § 1981 are conceptually as well as historically linked. Both are fundamentally equal protection enactments. The Fourteenth Amendment provides that “No state shall

... deny to any person . . . equal protection of the laws.” Section 1981 provides that “All persons . . . shall have the same right in every State . . . to make and enforce contracts . . . and to the full and equal benefit of all laws for the security of persons and property as is enjoyed by white citizens.”²¹ (Emphasis added).

Section 1 of the 1866 Act and its progeny have always been viewed as the guarantors of equal protection of the laws, or as stated by this Court in *United States v. Wong Kim Ark*, 169 U.S. at 695, “the protection of equal laws.” In explaining the purpose of the bill which was eventually to become Section 1 of the 1866 Act, its author and principal Senate supporter, Senator Trumbull, stated that “any statute which is not *equal to all*, and which deprives any citizen of civil rights, which are secured to other citizens is an unjust encroachment upon his liberty; and it is in fact a badge of servitude which by the Constitution is prohibited.” Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (Emphasis added). The equal protection foundation of § 1 was underscored by Senator Trumbull when he asserted that “it will have no operation in any State where the *laws are equal*, where all persons have the same civil rights without regard to race or color.” *Id.* at 476 (Emphasis added). Similarly in the House, Representative Shellabarger, a bill proponent, contended that it secured “*equality of protection* in those enumerated civil rights which the States may deem proper to confer

²¹ As noted in n. 13, *supra*, identical language appeared in § 1 of the 1866 Act, §§ 16 and 18 of the 1870 Act, and § 1977 of the Revised Statutes.

upon any races." *Id.* at 1293-1294 (Emphasis added).²²

The equal protection focus of § 1981 was sharpened through the constitutionalization of the 1866 Act into the Fourteenth Amendment and its subsequent reenactment in 1870 and codification in 1874 into Revised Statutes § 1977. Thus, § 1981 is now recognized as having been enacted—at least in part²³—pursuant to "Congress' power under the Fourteenth Amendment to provide for equal protection of the laws to all persons." *Runyon v. McCrary*, 427 U.S. at 204 (White, J., dissenting), citing *Gibson v. Mississippi*, 162 U.S. 565, 580 (1896) and *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Crocker v. Boeing Co.*, *supra* note 4, at 1181. Indeed, the official title to § 1981—which may properly be considered as an aid to construction—is "Equal rights under the law." See *Runyon v. McCrary*, 427 U.S. at 193, n.3 (White, J., dissenting).

In *Washington v. Davis* this Court explicitly disagreed with the notion that an equal protection violation could be predicated upon evidence of disproportionate impact alone. In language which is dispositive of this case, the Court stated:

We have difficulty understanding how a law establishing a racially neutral qualification for em-

²² Accord, *Basista v. Weir*, 340 F.2d 74, 86 (3rd Cir. 1965) (The Civil Rights Acts "were intended to confer equality in civil rights before the law in all respects for persons embraced within their provisions.")

²³ See n. 6, *supra*.

ployment is nevertheless racially discriminatory and denies "any person . . . equal protection of the laws" simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups. Had respondents, along with all others who had failed Test 21, whether white or black, brought an action claiming that the test denied each of them equal protection of the laws as compared with those who had passed with high enough scores to qualify them as police recruits, it is most unlikely that their challenge would have been sustained . . . Respondents, as Negroes, could no more successfully claim that the test denied them equal protection than could white applicants who also failed. The conclusion would not be different in the face of proof that more Negroes than whites had been disqualified by Test 21. That other Negroes also failed to score well would, alone, not demonstrate that respondents individually were being denied equal protection of the laws by the application of an otherwise valid qualifying test being administered to prospective police recruits.

426 U.S. at 245-246.²⁴ This conclusion was subsequently echoed in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977) when the Court advised that "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."

The *Washington v. Davis* and *Arlington Heights* analysis is equally applicable to § 1981 cases such

²⁴ Mr. Justice Brennan's dissent in *Washington v. Davis* did not address the issue under consideration in the quoted portion of the majority opinion. 426 U.S. at 257, n. 1.

as this.²⁵ Minority applicants who are ineligible to execute employment contracts with petitioners by virtue of their failure to pass a racially neutral aptitude examination suffer no greater a disadvantage than unsuccessful white applicants. Identical examinations have been administered to all races and identical grading and scoring standards applied. In statutory terms, minorities have been afforded, "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." Simply because the examination had a disproportionate effect on minorities does not—as this Court stated in *Washington v. Davis*—"demonstrate that respondents individually were being denied equal protection of the laws by the application of an otherwise valid qualifying test." 426 U.S. at 246. In the absence of evidence that the disproportionate impact is a product of discriminatorily motivated conduct, it cannot be said that minorities are being deprived on racial grounds of an equal capacity to contract as firemen.²⁶

²⁵ In *Lewis v. Bethlehem Steel Corp.*, *supra* note 4, at 963, the quoted portion of *Washington v. Davis* was relied upon as a basis for imposing an intent requirement upon §§ 1981 and 1982. See also *Johnson v. Alexander*, *supra* note 4, at 1123.

²⁶ This analysis is consistent with the Ninth Circuit's own interpretation of § 1981 as expressed in *Agnew v. City of Compton*, 239 F.2d 226, 230 (9th Cir. 1956), *cert. denied*, 353 U.S. 959 (1957). After noting that the purpose of §§ 1981 and 1982 "is to provide equality of rights as between different races," the complaint therein was dismissed because it did "not allege that appellant was deprived of any right which, under similar circumstances, would have been accorded a person of a different race."

The application of an intent requirement would also serve to harmonize § 1981 with its legislative purpose. Unlike Title VII which was enacted for purposes of prohibiting "all practices in whatever form which create inequality in employment opportunities"²⁷—including, arguably, facially neutral examinations having a disproportionate impact on minorities—the predecessors of § 1981 were enacted in an effort to curtail overt, intentional discrimination against Negroes.²⁸ The post-Civil War climate which generated these enactments was described by this Court in *Strauder v. West Virginia*, 100 U.S. at 306 as follows:

At the time when the [Thirteenth through Fifteenth Amendments] were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discrimination against them had been habitual. It was well known that in some States laws making such discrimination then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence [sic]. Their training had left them mere children, and as such they needed the pro-

²⁷ *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. at 763.

²⁸ *Lewis v. Bethlehem Steel Corp.*, *supra* note 4, at 963.

tection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States.

This was a period of rampant, overt racial discrimination; the concept of consequential discrimination resulting from the disproportionate impact of otherwise racially neutral conduct was still a century into the future. Congress in 1866 sought to address the fear of many that Negroes as a class might be "oppressed and in fact deprived of their freedom" not only by hostile laws but also by "prevailing public sentiment." Cong. Globe, 39th Cong., 1st Sess. 77 (1866), quoted in *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 431-432, n. 54. It was in light of this historical background that the Court stated in *Jones* with specific reference to § 1 of the 1866 Act and § 1982—but with equal applicability to § 1981²⁹—that they were intended to prohibit all "racially motivated" deprivations enumerated therein. 392 U.S. at 421 and 426.

Accordingly, by virtue of this Court's interpretation of equal protection requirements in *Washington v. Davis* and by virtue of its analysis in *Jones* of the evils sought to be eliminated by the predecessors of § 1981, it is evident that there are sound con-

²⁹ See n. 19, *supra*.

ceptual as well as historical reasons for maintaining an intent requirement for § 1981.

C. Application Of The Disproportionate Impact Standard To § 1981 Would Undermine Substantially Both *Washington v. Davis* And The Title VII Enforcement Scheme.

There are also sound practical reasons for applying an intent requirement to § 1981. In *Washington v. Davis*, the Court explained the adverse practical consequences which would flow from applying a disproportionate impact standard to Fourteenth Amendment claims:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white. [Citation omitted].

426 U.S. at 248. The Court concluded that extension of the disproportionate impact standard beyond those areas where it is already available by virtue of Title VII "should await legislative prescription." *Id.* Affirmance of the Ninth Circuit in this case would violate this principle and would effectively guarantee the very result which the Court expressly sought to avoid.

Section 1981 guarantees to all races not only the "same right . . . to make and enforce contracts", but also the "same right . . . to the full and equal benefit of all laws and proceedings for the security of persons and property" as is enjoyed by whites. (Emphasis

added). The scope of § 1981's prohibitions is thus virtually coextensive with that of the equal protection clause of the Fourteenth Amendment, and both extend far beyond the area of public employment. Accordingly, if a lesser standard of liability is applied to § 1981 than to the Fourteenth Amendment, the holding in *Washington v. Davis* can be circumvented entirely though the expediency of alleging a § 1981 rather than a Fourteenth Amendment claim. *Crocker v. Boeing Co.*, *supra* note 4, at 1181.

In addition to effectively negating the practical effect of the Court's decision in *Washington v. Davis*, application of Title VII standards of liability to § 1981 allegations would also undermine the enforcement scheme of Title VII itself. All of the remedies, both legal and equitable, which are available under Title VII may be available under § 1981. Indeed, in some respects the § 1981 remedies are more generous. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 460. Unlike § 1981, however, Title VII requires the exhaustion of certain administrative procedures as a condition to suit. If, however, the standards of proof for both provisions are identical and the remedies available under § 1981 more liberal, there is absolutely no incentive for aggrieved plaintiffs to opt for the more onerous administrative route.

This result of the Ninth Circuit's decision is more than of mere academic or passing interest. As a practical matter it will totally frustrate the scheme devised by Congress for the elimination of employment discrimination. The centerpiece of this scheme is the prompt resolution of discrimination charges through conciliation. Under Title VII a charge must

be filed within the relatively brief period of 180 days. Section 706(e), 42 U.S.C. § 2000e-5(e). A charge having been filed, the Equal Employment Opportunity Commission (EEOC) is required to exhaust all conciliation efforts prior to instituting suit. *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 359-360 (1977). In *EEOC v. Sherwood Medical Industries*, — F.Supp. —, 17 FEP Cases 441, 444 (M.D. Fla. 1978) the court noted "the mandate that conciliation be attempted is unique to Title VII and it clearly reflects a strong congressional desire for out-of-court settlement of Title VII violations." Similarly, the Fourth Circuit observed in *Patterson v. American Tobacco Co.*, *supra* n. 18, at 272 that the EEOC's "statutory duty to attempt conciliation is among its most essential functions." Clearly, the effect of equating the standards of proof required under Title VII and § 1981 will be to flood the federal courts with employment discrimination cases which might otherwise have been settled voluntarily and amicably by the disputants themselves through EEOC-supervised conciliation efforts.

Accordingly, unless the Ninth Circuit is reversed and the constitutional intent standard applied to § 1981, both the Court's desire to insulate nonemployment regulatory statutes from disproportionate impact challenges, and Congress' desire for a prompt and voluntary resolution of employment discrimination claims, will be seriously frustrated.

II. The Ninth Circuit's Quota Remedy Is Inappropriate.

A. The Courts' Remedial Authority Is Not Unlimited, But Is Restricted To Remediating Specific Violations Found.

The remedial quota established by the Ninth Circuit offends this Court's long established principle that "as with any equity case, the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *Milliken v. Bradley*, 418 U.S. 717, 744 (1974); and *The Regents of the University of California v. Allan Bakke*, — U.S. —, 46 U.S.L.W. 4896, 4904 (1978) (opinion of Mr. Justice Powell), and cases cited therein.

These same restrictions apply to employment discrimination claims where the remedial choices "are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975), citing *United States v. Burr*, 25 Fed. Cas. 30, 35. It is evident, therefore, that "courts may not impose . . . a remedy on an employer at least until a violation . . . has been proven." See *Furnco Construction Corp. v. Waters*, — U.S. —, 46 U.S.L.W. 4966, 4969 (1978).

In further explaining these remedial limits, this Court has stressed that, as under the National Labor Relations Act,³⁰ remedies under the civil rights acts

³⁰ See *Republic Steel Corp. v. N.L.R.B.*, 311 U.S. 7, 9-11 (1940); and *Local 60, Carpenters v. N.L.R.B.*, 365 U.S. 651, 655 (1961) (Where "no 'consequences of violation' are removed . . .; and no 'dissipation' of the prohibited action is

are designed to recreate the conditions and relationships that would have existed had there been no violation, and to make the employees whole as they would have been but for the employer's wrongful act. See *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. at 769. Therefore, a court should frame its relief with an eye toward remedying the particular wrong found, "and should interfere with the defendant's operations no more than is necessary to accomplish this result." See *EEOC v. IUOE, Locals 14 & 15*, 553 F.2d 251, 256 (2nd Cir. 1977).³¹ As now demonstrated, the remedial hiring order imposed by the court below is inconsistent with these requirements.

Thus, even assuming that the violations found by the Ninth Circuit may be maintained under § 1981,³² the hiring quota was outside its remedial authority. Indeed, the remedy appears to be unprecedented both for its disregard of the remedial standards established

achieved . . . [t]he order . . . becomes punitive and beyond the power of the Board.") See generally McDowell and Huhn, *NLRB Remedies for Unfair Labor Practices*, Industrial Research Unit, The Wharton School, University of Pennsylvania (1976) 6-15.

³¹ See also *Furnco Construction Corp. v. Waters*, 46 U.S.L.W. at 4969 ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."); and *Milliken v. Bradley*, 418 U.S. at 744 (Control of school district "is a task which few, if any, judges are qualified to perform.")

³² As shown above, however, the absence of discriminatory intent requires a dismissal of the § 1981 claims. If the Court accepts that contention, it need not reach the quota issue in this case.

by this and other courts, and for its failure to limit the remedy to the nature and extent of the violations.

Although the scope of the violations found by the district court was markedly broader than those sustained by the Ninth Circuit, the appellate court approved essentially the same remedy, thereby evidencing an insensitivity to the limits of its equitable authority. The district court's quota order was based on two primary factors: (a) an imbalance between the percentage of Blacks and Mexican-Americans in the County's workforce and the surrounding population at the time the complaint was filed; and (b) the County's 1969 and 1972 use of employment tests which had a disproportionate impact on minorities.

The Ninth Circuit substantially deviated from the findings of the court below and significantly narrowed the factors upon which its quota could be based. It found that there was no one among the named plaintiffs or the putative class who had standing to challenge the 1969 test because the hiring list compiled from that test was depleted before plaintiffs applied for employment. 556 F.2d at 1337-1338. This holding effectively precluded the named plaintiffs and putative class members (i.e., all present and future Black and Mexican-American applicants) from attacking any employment practices predating their applications.³³

³³ Because of this complete lack of standing, the majority found it unnecessary to rule on the applicability of *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395 (1977). 556 F.2d at 1338, n. 6. There the Court held that a plaintiff who has been adjudicated not to have suffered the

The only testing violation found by the Ninth Circuit was in the County's unfulfilled decision to use the 1972 written test as a selection device. As Judge Wallace noted, both he and the majority agreed that "defendants are liable for nothing more than devising a plan—never carried out—which would have had a discriminatory impact." 556 F.2d at 1352. He also stressed that the plaintiffs' brief had conceded that "the post-March 1972 discrimination . . . had no 'effects.'" *Id.* The majority nevertheless ratified the quota imposed by the district court, apparently relying upon the underutilization of minorities in the workforce as compared with their availability. 556 F.2d at 1334. But as Judge Wallace indicated, these statistics "are necessarily the result of the County's pre-1971 hiring practices, since no firemen were hired thereafter until the complaint was filed." 556 F.2d at 1345.

The error committed by the Ninth Circuit here is grounded on the same fallacy which prompted this Court to reverse the Seventh Circuit in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). There, the Court cautioned that the difference between a remedy issue and a violation issue must be kept clear. 431 U.S. at 559. It is only after a timely discrimination claim has been filed and a finding of discrimination upon that claim has been made that the courts have the authority to contemplate whether a remedy may be imposed. Under this teaching in *Evans*, the

injury allegedly sustained by an uncertified class is not a class member and may not be a class representative. From *Rodriguez*, it follows *a fortiori* that the validity of petitioners' pre-1971 employment practices could not be attacked here because no class member had standing to pursue the claim.

crucial question is not whether there may be some continuity between existing conditions and some past conduct. The question, rather, is whether any present violation exists. 431 U.S. at 558. It is not sufficient—as the courts below have sought to do—to support a discrimination claim by merely showing that some effects of past conduct persist. This is true even if the past event might have at some time supported a valid claim against the employer. Unless such a claim is made at the proper time, it may, at most, be used as relevant background evidence in a proceeding concerning a current practice.

As cogently stated in Judge Wallace's dissent, "the racial imbalance of which the plaintiffs complain was neither aggravated nor perpetuated by the defendants' actionable discrimination." 556 F.2d at 1352. Because there is no authority for a court "imposing on an employer a duty to implement an affirmative action program or other corrective measures absent a court finding" of a violation, the remedy at issue is improper. *EEOC v. Delta Air Lines, Inc.*, — F.Supp. —, 14 EPD (CCH) par. 7783, p. 5633 (N.D. Ga. 1977). See also *Lewis v. Tobacco Workers*, — F.2d —, 17 FEP Cases 622, 627 (4th Cir. 1978).

Because no allegations of widespread pre-1971 violations were properly before the Ninth Circuit, its remedial order here is not supported by the prospective hiring provisions contained in the consent decree referred to in *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 330, n.4 (1977). (See Respondents op. cert. at 27). There, the Court repeatedly stressed the fact that a widespread "pattern and

practice" of discrimination had been shown, and further pointed out that a "single, insignificant, isolated act of discrimination by a single business" would not establish a pattern or practice. 431 U.S. at 336-337, n. 16.

In addition, the remedial discussion set forth in *Teamsters* does nothing to support the Ninth Circuit's quota. For, rather than permitting a blanket preference for minorities, the Court established a system under which applicant and nonapplicant claimants would be required to identify themselves to the district court in a remedy proceeding as victims of the discriminatory hiring and transfer practices. The requirements for nonapplicants are particularly instructive, as the Court stated that the possibility of obtaining relief "is a far cry, however, from holding that nonapplicants are always entitled to relief." 431 U.S. at 367. Instead, the claimant must carry the difficult burden of establishing he was deterred by the illegal practices from applying for the job. 431 U.S. at 367-368.

Likewise, the retroactive seniority relief sanctioned in *Franks v. Bowman Transportation Co., Inc.*, was limited to identifiable victims of an established pattern or practice of discrimination. 424 U.S. at 772, 774. As pointed out in *Teamsters v. United States*, this pattern or practice established in *Franks* was a prerequisite for the creation of a rebuttable presumption in favor of individual relief. See 431 U.S. at 358-359 and n. 45.

It is evident, therefore, that the preferential hiring order in this case far exceeds any remedy previously sanctioned by this Court.

B. Workforce Racial Imbalance Alone Will Not Support The Quota Remedy.

By imposing the preferential hiring remedy, the Ninth Circuit attempted to *compel* the County to adopt hiring procedures to assure that its workforce's racial composition would closely mirror the surrounding general population.³⁴ But, where, as here, the violation found has not contributed to that imbalance, such a remedy is much more stringent than permitted by the civil rights laws.

This Court has emphasized repeatedly that the obligation imposed on employers by the relevant non-discrimination statutes is to provide "an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the workforce." See *Furnco Construction Corp. v. Waters*, 46 U.S.L.W. at 4970. As stated in *Griggs v. Duke Power Co.*, 401 U.S. at 430:

Congress did not intend Title VII, however, to guarantee a job to every person regardless of

³⁴ It should be noted that this case does not call into question the validity of affirmative action plans which have been undertaken *voluntarily* to achieve racial balance. Compare *Weber v. Kaiser Aluminum and Chemical Corp.*, 563 F.2d 216 (5th Cir. 1977), *pet. for reh'g denied*, 571 F.2d 337; and *Detroit Police Officers Assn. v. Young*, 446 F.Supp. 979 (E.D. Mich. 1978), *appeal pending* No. 78-1163 (6th Cir.). Cf. *The Regents of the University of California v. Allan Bakke*, *supra*. Rather, at issue is the authority of the court to *impose* such relief absent sufficient supportive findings of discrimination.

qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.

Accord, *McDonnell Douglas Corp. v. Green*, 411 U.S. at 800-801; and *Int'l. Brotherhood of Teamsters v. United States*, 431 U.S. at 340, n.20 ("Title VII imposes no requirement that a workforce mirror the general population.").³⁵ Similarly, the courts repeatedly have held that Section 1981 "is by its very terms . . . not an affirmative action program." *Long v. Ford*

³⁵ Although statistical disparities in some circumstances might establish a *prima facie* case of discrimination, it is important not to equate a *prima facie* showing with an ultimate finding of a discriminatory refusal to hire. See *Furnco Construction Corp. v. Waters*, 46 U.S.L.W. at 4969-4970. Even less appropriate is the Ninth Circuit's attempt to fashion a remedy based upon background underrepresentation statistics not directly related to the charges considered by the court. Such an approach effectively deprives the employer of his opportunity to present rebuttal evidence to counteract the plaintiff's undifferentiated statistical evidence. See generally *Int'l. Brotherhood of Teamsters v. United States*, 431 U.S. at 339-340 and n. 20; and *Hazelwood School District, et al. v. United States*, 433 U.S. 299, 307-313 (1977).

Motor Co., 496 F.2d 500, 505 (6th Cir. 1974).
Rather:

It is an equalizing provision seeking to ensure that rights do not vary according to race. It does not require that persons be accorded preferential treatment because of their race. *Id.*³⁶

As shown above, the evident purpose of the hiring remedy was to impose a hiring scheme to racially balance the employer's workforce, even though there was no related finding of discrimination and not even a putative class member who would have been eligible to attack the practices which might have contributed to the imbalance. Previously, this Court has cautioned the appellate courts that such an approach is impermissible. As stated in *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 417 (1977):

Viewing the findings of the District Court as to the three-part "cumulative violation" in the strongest light for the respondents, *the Court of Appeals simply had no warrant in our cases for imposing the systemwide remedy which it apparently did.* There had been no showing that such a remedy was necessary to "eliminate all vestiges of the state-imposed school segregation." It is clear from the findings of the District Court that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact without

³⁶ Accord, *Blount v. Xerox Corp.*, 405 F. Supp. 849, 853, (N.D. Cal. 1975); *Broussard v. IUOE Apprenticeship Committee*, — F. Supp. —, 10 FEP Cases 780, 784 (D. Md. 1974); and *Dickerson v. United States Steel Corp.*, *supra* n. 4, at slip op. p. 20.

more, of course, does not offend the Constitution. *Spencer v. Kugler*, 404 U.S. 1027 (1972); *Swann*, [402 U.S. at 24]. The Court of Appeals seems to have viewed the present structure of the Dayton school system as a sort of "fruit of the poisonous tree," since some of the racial imbalance that presently obtains may have resulted in some part from the three instances of segregation action found by the District Court. *But instead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope.* (Emphasis added).

Under these principles, the hiring remedy should be set aside because it fails to limit the remedy to correlative acts of discrimination and is directly contrary to the basic principles underlying the civil rights acts.

C. The Court's Remedial Order Lacks Judicial Support.

As demonstrated above, the preferential hiring remedy was imposed by the Ninth Circuit without any evident concern about whether such a remedy was justified by the discrimination found. In fact, in its discussion of the quota remedy, the Ninth Circuit majority barely mentions the violations at all, but rather relies mainly upon a boilerplate string citation of the cases which have approved preferential hiring relief. None of those decisions was discussed in any detail, and a brief examination reveals that the Ninth Circuit's facile approach contrasts greatly with virtually every other decision approving quotas.

Thus, many other appellate decisions have recognized the sensitive problems raised by the remedy and have expressed reluctance in granting quota relief,

even where widespread systemic discrimination has been proven. As was stated in *Crockett v. Green*, 388 F. Supp. 912, 921 (E.D. Wis. 1975), *aff'd*, 534 F.2d 715 (7th Cir. 1976):

[R]atio hiring or quota relief is an unusual and extraordinary remedy and does not automatically follow from the finding of any kind of discrimination . . . [It] is appropriate . . . [where] . . . it appears to be the *only* possible means to provide relief for racial discrimination. (Emphasis added).³⁷

In addition, the principal cases approving quota relief have done so only after particularly egregious

³⁷ Accord, *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1041, *reh. denied*, 430 U.S. 911 (1977) ("Quotas are an extreme form of relief and, while this Court has declined to disapprove their use in narrow and carefully limited situations [citations omitted], certainly that remedy has not been greeted with enthusiasm."); *Patterson v. American Tobacco Co.*, *supra*, note 18, at 274 ("[T]he necessity for preferential treatment should be carefully scrutinized and . . . such relief should be required only when there is compelling need for it."); *United States v. City of Chicago*, *supra* note 4, at 437 ("Preferential numerical relief nevertheless remains an extraordinary remedy, and its use must be justified by the particular circumstances of each case."); *White v. Carolina Paperboard Corp.*, — F.2d —, 16 FEP Cases 44, 58 (4th Cir. 1977) ("But we have declined to approve the imposition of quotas where, as here, adequate relief can be obtained without their use."); and *Harper v. Kloster*, 486 F.2d 1134 (4th Cir. 1973). See also *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420, 427 (2nd Cir. 1975), *reh'g en banc denied*, 531 F.2d 5, *cert. denied*, 429 U.S. 823 (1976) ("The most ardent supporters of quotas . . . have recognized their undemocratic inequities and conceded their use should be limited."); and *EEOC v. Local 638*, 532 F.2d 821 (2nd Cir. 1976).

discriminatory practices had been properly established by timely claims and specifically set forth as the basis for the relief imposed. For example, in *United States v. Lathers, Local 46*, 471 F.2d 408 (2d Cir. 1973), a quota was ordered only after the union was cited for contempt in failing to comply with a court-approved settlement agreement. And even where such practices have been established, the decisions indicate that the preferential relief may go no further than to eliminate the identifiable lingering effects of previous discriminatory practices by the particular employer.³⁸

In sum, most appellate courts, while not entirely consistent in their approaches to quotas and other preferential remedies in cases of employment discrimination, have been more careful in assessing liability, and much more reluctant to impose quota remedies than the Ninth Circuit in this case. It follows, therefore, that "in view of the limited scope of the issues framed in this class action and the paucity of

³⁸ *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Western Addition Community Organization v. Alioto*, 514 F.2d 542 (9th Cir. 1975), *cert. denied*, 423 U.S. 994 (1975); *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir. 1974) (*en banc*), *cert. denied*, 419 U.S. 895 (1974) (Temporary quota imposed because of lack of compliance with district court's initial decree); and *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974) (The quota "is a form of relief which should be reserved for those situations in which less restrictive means have failed or in which the chancellor could reasonably foresee that they would fail").

the proof concerning past discrimination,"³⁹ the quota hiring remedy established below should be set aside.⁴⁰

CONCLUSION

For the foregoing reasons, the Equal Employment Advisory Council respectfully submits that the judgment of the Ninth Circuit should be reversed with instructions that the order of the district court be vacated and the complaint dismissed.

Respectfully submitted,

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³⁹ *Kirkland v. Department of Correctional Services*, 520 F.2d at 428.

⁴⁰ For a fuller discussion of court decisions relating to preferential treatment remedies under Title VII and other civil rights acts see McGuinness, *Preferential Treatment in Employment—Affirmative Action or Reverse Discrimination?*, EEAC (1977) 73-106.

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1978

No. 77-1553

COUNTY OF LOS ANGELES, et al.,

Petitioners,

vs.

VAN DAVIS, et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

**BRIEF OF THE ANTI-DEFAMATION LEAGUE
OF B'NAI B'RITH, AMICUS CURIAE,
IN SUPPORT OF PETITIONERS**

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**BRIEF OF THE ANTI-DEFAMATION LEAGUE
OF B'NAI B'RITH, AMICUS CURIAE,
IN SUPPORT OF PETITIONERS**

CONSENT OF THE PARTIES

Petitioners and Respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the civil rights of all persons, be they

minority or majority, and in assuring that every individual receives equal treatment under law regardless of his or her race or religion.

Among its many other activities directed to these ends, the Anti-Defamation League has in the past filed *amicus* briefs in this Court urging the unconstitutionality or illegality of racially discriminatory laws or practices in such cases as, *e.g.*, *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Colorado Anti-Discrimination Commission v. Continental Airlines, Inc.*, 372 U.S. 714 (1963); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *De Funis v. Odegaard*, 416 U.S. 312 (1974); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Regents v. Bakke*, 98 S. Ct. 2733 (1978).

STATEMENT OF THE CASE

In January, 1973, when this case was filed, the workforce of the Los Angeles County Fire Department was 0.5% black and 2.8% Mexican-American, although the population of the County was 10.8% black and 18.3% Mexican-American. (R. 160.) From 1968 to 1972 (the only years for which data was included in the record), the Department was hiring new firemen at the rate of approximately 100 each year; in 1968 it had 683 applicants for these positions, in 1969 it had 1,424 applicants and in 1972, 2,414 applicants. (R. 138, 140.)

In 1968 and 1969 written tests were used in ranking applicants. Although the district court found that defendants did not have "a willful or conscious purpose of excluding blacks and Mexican-Americans from employment," it did conclude that these tests had a disproportionately adverse effect upon black and Mexican-American applicants. (R. 160, 162.)

In 1972 the Department eliminated the use of the written test as a selection device, and substituted a procedure in which a written test was to be used only to screen out illiterates. Because 97% of the 2,414 applicants passed the 1972

test, the Department decided to choose at random 500 of those who had passed for interviews and physical agility tests. The results of those interviews and physical tests were then to be used to construct a ranked eligibility list. However, before the Department selected the 500 candidates, a state court temporarily enjoined the random selection pending determination of whether it violated a California Code provision requiring merit selection.

In early January, 1973* the Department, not having formulated an eligibility list for several years, decided to interview applicants who had scored in the top 544 places on the 1972 test. Shortly thereafter, however, the Department abandoned this idea and instead interviewed all applicants who had passed the test. Later in 1973, as a result of those interviews, a hiring list was certified. Plaintiffs have stipulated that that hiring list did *not* have a disproportionate impact on black and Mexican-American applicants. R. 140-141; *Davis v. County of Los Angeles*, 566 F.2d 1334, 1346 (9th Cir. 1977).

On January 11, 1973, plaintiffs, who are blacks or Mexican-Americans who had applied for employment as firemen in 1971 and taken the 1972 written test, filed this suit on behalf of a class consisting of all current and future black and Mexican-American applicants for employment as firemen,** (R. 62) alleging that the Department had engaged in racially discriminatory hiring practices in violation of the Fourteenth Amendment, 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*

The district court found in favor of the plaintiffs, holding that the Department had violated Title VII (which had become applicable to it in March 1972) and § 1981 by (1) using written tests as a selection device prior to learning that the present suit was about to be filed, and (2) failing to take the necessary

* The January 1972 date in the stipulation in the record (R. 141) is apparently a typographical error, inasmuch as the test was not given until January 1972 (§ 6 of the complaint).

** The class also included blacks and Mexican-Americans who were already employees of the Department. These plaintiffs originally challenged the lawfulness of defendants' promotion practices as well. That claim was later abandoned, however, by stipulation of the parties. (R. 134.)

steps to dispel its reputation in the black and Mexican-American communities as an employer who discriminated against those groups. (R. 160.) However, the district court also found that the Department had not interfered with individual affirmative action efforts by certain of its officials to recruit larger numbers of black and Mexican-American applicants and, further, that neither the Department nor its officials had engaged in the foregoing unlawful practices "with a willful or conscious purpose of excluding blacks and Mexican-Americans from employment." (R. 160, 162.) The court also found the Department's minimum height standard of 5'7", challenged as having a disparate impact on Mexican-American applicants, to be job-related. (R. 160.)

In its findings of fact the court stated that the defendants had failed to "justify" the disparity between the numbers of minority workers it employed and the numbers in the population. The court therefore concluded that the racial imbalance in defendants' workforce was an "effect" of past discrimination. Citing the principle that a court of equity has a duty to eliminate the "present effects of past discrimination," the court decreed that of the firemen hired each year, 20% must be black and 20% Mexican-American until the racial percentages in the workforce were equal to the percentages of blacks and Mexican-Americans in the general population of Los Angeles County. (R. 160, 164, 166.) The record indicates that, at current hiring rates, it will take approximately ten more years to meet this goal for blacks and twenty more years for Mexican-Americans.*

Defendants appealed the entire judgment of the district court; plaintiffs appealed only those aspects of the judgment upholding the minimum height requirements.

The court of appeals affirmed the district court's finding that, notwithstanding the absence of a racially discriminatory

* Footnote 3 of the court of appeals' opinion, 566 F.2d at 1336, erroneously sets forth much shorter time spans, but they are in fact based upon an assumed 1-1-1 hiring ratio. Plaintiffs themselves pointed this out on page 36 of their brief on rehearing, where they noted that it would take until 1987 for blacks and until 2001 for Mexican-Americans to reach parity if the Department hired one-third minorities each year.

purpose, the Department's proposed, but abandoned, use of the 1972 written test as a ranking device violated Title VII and § 1981 (Judge Wallace dissenting as to § 1981); the court of appeals, however, rejected the district court's finding that the use of the 1969 test constituted actionable discrimination, holding that the plaintiff class, which did not include unsuccessful applicants from that year, "lacked standing to challenge defendants' prior use of [that] test." 566 F.2d at 1338. The court of appeals affirmed (Judge Wallace dissenting) the quota remedy, but remanded the case for consideration of raising the Mexican-American quota in light of its holding that the 5'7" height limitation was unlawful. 566 F.2d at 1343.

QUESTION ADDRESSED

This brief will limit itself to the racial hiring quota issue. However, if this Court decides that a constitutional standard of liability applies to § 1981, there will be no need to decide the lawfulness of the racial quota relief in this case, inasmuch as the district court found that defendants did not at any time have a purposeful intent to discriminate against black and Mexican-American job applicants.

ARGUMENT

THE RACIAL QUOTA IN THIS CASE VIOLATES THE PRINCIPLES WHICH LIMIT THE POWER OF THE DISTRICT COURT TO GRANT RELIEF.

In recent years this Court has, on several occasions, discussed the standards to be followed by district courts in fashioning equitable decrees to grant relief from actionable race discrimination in employment. In such cases the Court has consistently held that every effort should be made to put identifiable victims of discrimination in the position they would have been in but for the discrimination. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772-73 (1976). However, this Court has also recognized that a member of a minority group that has been discriminated against does not automatically qualify as a "victim of discrimination" simply by virtue of his race. Rather, in *Teamsters v. United States*, 431 U.S. 324, 363-64 (1977), the Court emphasized that each individual requesting relief must prove that he or she has actually suffered discrimination.

This Court has also emphasized that, in framing an equitable decree, the district court must "tailor 'the scope of the remedy' to fit 'the nature and extent of the . . . violation' " proved, *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 420 (1977). When the disparity between the violation found and the relief granted becomes too great, the district court's order must be reversed, as it was in *Dayton. Id.* at 419.

Furthermore, in considering what constitutes proper relief, the district court has an obligation to determine whether the legitimate expectations of innocent third parties would be imperiled by its proposed decree. If so, the court must undertake the delicate task of balancing the interests at stake. For, as this Court stated in *Teamsters v. United States*, *supra*, 431 U.S. at 375:

"[W]hen immediate implementation of an equitable remedy threatens to impinge upon the expectations of inno-

cent parties, the courts must 'look to the practical realities and necessities inescapably involved in reconciling competing interests,' in order to determine the 'special blend of what is necessary, what is fair, and what is workable.' *Lemon v. Kurtzman*, 411 U.S. 192, 200-201 (opinion of Burger, C.J.)."

Unfortunately, the lower courts in the case at bar appear to have ignored these fundamental principles. Instead of tailoring the decree to the at best *de minimis* violations proved, the courts imposed a drastic quota remedy that will encumber defendants' hiring decisions for many years to come. In so doing, the courts were not attempting to remedy injuries actually inflicted on individual members of the plaintiff class; plaintiffs conceded that no such injuries existed. Rather, the courts were apparently attempting to remedy the injuries suffered by an entire race of people over a long period of time.

We submit that such a result violates not only settled principles governing a court's equitable powers but also fundamental concepts of standing, limitations, due process and equal protection.

A. The Court Failed to Tailor the Remedy to the Limited Nature of the Violation.

The courts below found that defendants had engaged in two employment practices which, because of their disproportionate impact on blacks and Mexican-Americans, violated Title VII and § 1981: (i) the intent—never carried out—to use scores on the 1972 written test to rank job applicants and (ii) the enforcement of a 5'7" minimum height limitation.

In paragraph 9 of their second amended complaint, plaintiffs conceded that the 1973 hiring list compiled by the Department

"did not have a disproportionate detrimental impact upon black and Mexican-American applicants. Due to the change in selection procedures, a substantial number of minorities have been placed at or near the top of the eligibility list of current applicants for hire as Los Angeles County firemen, with the result that, subject to medical examinations now being carried out, it is antici-

pated that *there will be approximately thirty-three minority persons among the first class of inductees which will total sixty persons.*" (R. 16.) (Emphasis added.)

Because of this lack of disparate impact, plaintiffs conceded before the court of appeals that the "post-March 1972 discrimination, challenged under Title VII and Section 1981, had no 'effects.'" Plaintiffs' Brief on Rehearing at 1.

From the foregoing it is clear that no relationship has been shown, or even claimed, between the uneffectuated intent to use the 1972 written test as a selection device and the drastic remedy of a racial hiring quota. The height limitation is also clearly not relevant to the quota.

The only other violation found in this case was the Department's "failure and refusal to take necessary affirmative steps" to overcome the Department's reputation of discriminating against blacks and Mexican-Americans. The district court held that this was an independent violation of § 1981 and Title VII. The court of appeals did not rule on this question, although it relied on the district court's finding to support the quota remedy.

We think it is clear that the mere failure to take affirmative steps cannot be an independent violation of either § 1981 or Title VII, inasmuch as neither statute by its terms requires such affirmative steps. However, we do not dispute the court of appeals' assumption that a bad reputation in the community, although not actionable as such, may be an effect of past discrimination that will have a continuing impact on the employment opportunities of minorities in the future. As this Court noted in *Teamsters v. United States*, *supra*, 431 U.S. at 365-66, the effect of such a reputation may well be to discourage minorities from even applying for work. But the appropriately tailored relief for such a condition surely is not a racial hiring quota.

A similar problem was faced in *Franks v. Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974), *rev'd on other grounds*, 424 U.S. 747 (1976), where the employer's practice of relying on "word of mouth" recruiting was found to have perpetuated the past discrimination which had created an all-

white workforce.* In that case the court of appeals required the district court to impose a "recruitment remedy" that would compel the employer to take affirmative steps, such as placing advertisements for job openings and notifying employment agencies, to increase the number of minority applicants.**

Assuming that a defendant cooperates with the court's decree in good faith, this type of remedy should be sufficient to erase not only the reputation problem but the racial imbalance as well. For, if the chilling effect of past discrimination is dissipated through a recruiting campaign and if new job applicants are accorded an equal opportunity to compete for job openings, it is reasonable to assume that over a period of time the racial imbalance will be adjusted without the interference of a court:

"... it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *Teamsters v. United States*, *supra*, 431 U.S. at 340 n. 20.

There is no reason to believe that a recruiting remedy would not have been successful in this case. As we noted above, the district court found that defendants were not guilty of purposeful discrimination. Moreover, the court found that "several of Defendants' officials [had] engaged in efforts designed to increase the minority representation in the . . . Department," without interference from the Department. Finally, the Department's performance in the years since the hiring quota was imposed, in hiring 55% minorities rather than the

* The court in that case described the problem as follows:

"[W]hen all current employees in a unit are white 'word-of-mouth hiring alone would tend to isolate blacks from the 'web of information' which flows around opportunities at the company.' Although this recruiting method is racially neutral in form, in practice it operates as a 'built-in headwind' to blacks." 495 F.2d at 419.

** In *Teamsters v. United States*, *supra*, 431 U.S. at 365 n. 51, this Court specifically approved of this type of remedy to dispel more subtle forms of continuing discrimination.

40% required by the decree, is strong evidence that it would have cooperated fully to ensure equal opportunity for minority applicants in the future.

B. The Plaintiff Class Did Not Contain Identifiable Victims with Live Claims of Discrimination.

The courts below sought to justify the imposition of a racial hiring quota on the ground that it was necessary to remedy an "effect" of past discrimination: *viz.*, the racial imbalance in the Department's work force. In their brief in opposition to the petition for certiorari, plaintiffs attempt to support this reasoning, arguing that the defendants had been guilty of a "pattern and practice of discriminatory practices that were unlawful . . . under § 1981." Brief at 29.

Neither the courts below nor the plaintiffs have ever argued that this past, allegedly illegal conduct had an impact on the rights of individual class members. Indeed, it is clear that the events constituting the alleged past discrimination must have occurred before any of the current plaintiffs (who are all either 1971 or future applicants) applied for jobs with the Department. Plaintiffs concede that no discriminatory acts occurred after March, 1972, when Title VII became applicable to the Department. As noted above, they stipulated that the 1971 applicants were not discriminated against in the formulation of the 1973 hiring list.

It is also clear that the "past discrimination" must have occurred prior to the cut-off date for § 1981 claims under the applicable three-year statute of limitations.* The only "violation" even arguably committed after January, 1970 would have been the continued use of a hiring list based on the 1969 written test.** The court of appeals found that, because the plaintiff class did not include unsuccessful applicants from

* The statute of limitations for actions under § 1981 is borrowed from the applicable state statute. *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975). The Ninth Circuit has held that under California law a three-year statute of limitations applies to § 1981 claims. *Mills v. Small*, 446 F.2d 249 (9th Cir.), *cert. denied*, 404 U.S. 991 (1971).

** It is unclear from the record whether there was any hiring in this period.

1969, the class did not have standing to complain about the use of that test. 566 F.2d at 1337-38. But even if plaintiffs *had* included unsuccessful 1969 applicants in their class description, it is clear that the 1969 test did not create all, or even a significant part of, the racial imbalance that the quota was designed to remedy.

On the face of it, plaintiffs' claim is defective in two respects: *first*, because no member of the plaintiff class was injured by the past discrimination, or will be injured in the future by it, the class would seem to be without standing to sue to redress the alleged violations, and *second*, because the acts in question were committed prior to the effective date of Title VII and outside the applicable statute of limitations under § 1981, claims based thereon would seem to be time-barred. Plaintiffs, however, argue that they are not bound by the ordinary concepts of standing or statutes of limitation. They arrive at this extraordinary conclusion by asserting that they are acting as "private attorneys general," who are suing to redress an injury to the public interest rather than a wrong done to them individually.

Plaintiffs' argument assumes that a class of individuals has standing to sue to redress injuries inflicted on other individuals, simply because the plaintiff class and the victims share a common racial or ethnic heritage. This Court, however, has never excused private parties from the requirement of establishing injuries to their own legally cognizable rights. See, *e.g.*, *Warth v. Selden*, 422 U.S. 490, 499 (1975): "[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."

Moreover, in pattern and practice cases, such as *Teamsters*, and class actions, such as *Franks*, this Court has always paid close attention to the requirement that each person who asserts a claim for relief must prove that he or she was actually a victim of discrimination. A racial hiring quota ignores the need for such individualized compensation in favor

of wholesale "relief" to anyone who happens to be a member of the allegedly disfavored group.

Such an approach is fundamentally inconsistent with the individual character of the rights guaranteed by § 1981. Section 1981 says nothing about the rights of one racial group as against another. Rather, it seeks to ensure that "all persons" have an opportunity to enter into contracts, regardless of the color of their skin. See *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).*

Furthermore, by deflecting concern away from the individual, the approach urged by plaintiffs would inevitably cause the courts to become less interested in preserving the "equality of employment opportunities" guaranteed by the civil rights laws, *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971), and more interested in maintaining racial balance. As this Court has recently held, however, an individual's equal opportunity rights may not be affected by the racial composition of the workforce he is seeking to join:

"It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." (Emphasis in original.)

Furnco Construction Corp. v. Waters, 98 S. Ct. 2943, 2951 (1978). Any other result would raise the type of concerns voiced by Mr. Justice Powell in *Regents v. Bakke*, 98 S. Ct. 2733, 2752 (1978): As he noted, preferences for a particular group may in turn lead to the need for other preferences: for, as preferences "have their desired effect and the consequences of past discrimination [are] undone, new judicial rankings would be necessary."

Plaintiffs also argue that their status as "private attorneys general" exempts their claims from the statute of limitations.

* As Mr. Justice Stevens stated in *Los Angeles v. Manhart*, 98 S. Ct. 1370, 1375 (1978), in construing similar language in Title VII: "The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class."

In support of this argument plaintiffs cite three court of appeals cases* holding that "pattern and practice" suits brought by the EEOC under Title VII are not barred by a state statute of limitations, because the statute does not apply to suits brought on behalf of the sovereign. In *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977), this Court agreed with the lower courts that the EEOC is not subject to a state statute of limitations in such suits. But it did not base its decision on the EEOC's status as a representative of the public interest. Rather, the Court found support for its decision in the legislative history of the amendment extending the power to sue to the EEOC and in the procedural protections afforded potential defendants by the EEOC's notice procedures.

There is no comparable legislative history to indicate that plaintiffs in this case should be similarly exempted from the ordinary limitations rules; nor were defendants in this case protected from stale claims by any type of notice procedures comparable to those employed by the EEOC. Moreover, there are clear policy reasons for not allowing a plaintiff to circumvent the statute of limitations in order to accelerate the elimination of a racial imbalance that resulted from a history of discrimination.

Under Title VII a court is prohibited from imposing a quota for the sole purpose of curing a racial imbalance resulting from pre-Act discrimination. The legislative history of Title VII indicates that its effect was to be prospective only. As an interpretive memorandum placed in the record by the sponsors of the bill stated:

"if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to

* *EEOC v. Occidental Life Ins. Co.*, 535 F.2d 533, 537-40 (9th Cir. 1976), *aff'd*, 432 U.S. 355 (1977); *EEOC v. Griffin Wheel*, 511 F.2d 456, 458-59 (5th Cir. 1975); *EEOC v. Kimberly Clark Corp.*, 511 F.2d 1352, 1359-60 (6th Cir. 1975). See Plaintiff's Brief in Opposition to the Petition for Certiorari at 30.

give them special seniority rights at the expense of the white workers hired earlier." 110 Cong. Rec. 7213 (1964).

See also *Teamsters v. United States*, *supra*, 431 U.S. at 356-57, where this Court held that "Those employees who suffered only pre-Act discrimination are not entitled to relief, and no person may be given retroactive seniority to a date earlier than the effective date of the Act."

The same principle applies to a racial imbalance in the workforce of a public employer that had discriminated prior to March 1972 when Title VII first became applicable to it:

"A public employer who from [the Act's effective date] forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes." (Emphasis added.) *Hazelwood School Dist. v. United States*, 433 U.S. 299, 309 (1977).

In a footnote to *Hazelwood*, *id.* at 309 n. 15, the Court pointed out that the school district had been subject to the commands of the Fourteenth Amendment during the entire period when the past discrimination had occurred. Yet the Court held that, even if the school district had violated the Constitution, the pre-Act conduct could not be remedied under Title VII.

A racial imbalance caused by unlawful acts committed outside the the applicable statute of limitations under § 1981 should be treated in the same way that a racial imbalance resulting from pre-Act discrimination is treated for Title VII purposes. As this Court stated in *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977):

"A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences."

To uphold the imposition of a racial hiring quota in this case, where its sole purpose is to erase an historically caused racial

imbalance, would be to reach back into the past to remedy a series of "unfortunate event[s]"* which should not have "present legal consequences."

C. The Racial Quota Fails to Consider the Interests of Innocent Third Parties.

If there had been identifiable victims of actionable discrimination in this case, the district court would have been required under this Court's decisions in *Teamsters v. United States*, *supra*, 431 U.S. 324, and *Franks v. Bowman Transportation Co.*, *supra*, 424 U.S. 747, to undertake the "delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations" of other persons "innocent of any wrongdoing." *Teamsters v. United States*, 431 U.S. at 372. The district court failed even to recognize that it had this responsibility, and instead imposed a drastic quota remedy without discussion.

Where there is a close connection between an actionable injury to an identifiable victim and the relief proposed, a court may be justified in ultimately concluding that the need to compensate the victims outweighs the legitimate expectations of innocent white workers and applicants. But where the connection is as attenuated as it is in this case, the expectations of innocent individuals must take priority. As Mr. Justice Powell recognized in *Bakke*:

"All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others." (Emphasis in original.) 98 S. Ct. at 2751 n. 34.

* In this case there was no proof of any past instances of discrimination. The district court, however, presumed from the racial imbalance itself that there must have been such discrimination.

If the quota is upheld in this case, for the next ten years white applicants for the position of a fire-fighter in the Los Angeles County Fire Department will be denied the opportunity to compete for 40% of the available positions, solely on account of their race. Surely such a drastic curtailment of the equal opportunity rights of innocent individuals who happen to be white* cannot be justified in the absence of a showing that it is necessary to protect the rights of identifiable victims.

D. The Quota Violates Equal Protection and Due Process Principles.

Although this Court need not reach constitutional due process and equal protection principles in order to set aside the decree, we submit that the racial quota violates those principles as well. As Mr. Justice Powell stated in *Bakke*:

"It suffices to say that '[o]ver the years, this Court consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality."' *Loving v. Virginia*, 388 U.S. 1, 11 . . . quoting *Hirabayashi*, 320 U.S., at 100." 98 S. Ct. at 2750.

* * * *

"This Court has not sustained a racial classification since the wartime cases of *Korematsu v. United States*, 323 U.S. 214 . . . and *Hirabayashi v. United States*, 320 U.S. 81 . . . involving curfews and relocations imposed upon Japanese-Americans." 98 S. Ct. at 2752 n. 37.

This is certainly not the case in which the Court should embark upon a new course of constitutional law which would have the effect of resurrecting pernicious doctrines under which the Government, and in particular the judiciary, is allowed to classify people solely on the basis of their race.

* It is clear that § 1981—the only statute under which plaintiffs seek to justify the quota—is an equal protection statute intended to protect white persons, as well as members of minority groups. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).

CONCLUSION

The racial quota hiring decree has no valid basis in law or public policy. To the extent that the lower federal courts have imposed such remedies, they are out of step with the decisions of this Court and the requirements of our legal system. The judgment below, to the extent it imposed a racial hiring quota, should be reversed.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 77-1553

COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS OF THE COUNTY
OF LOS ANGELES; and CIVIL SERVICE COMMISSION OF THE
COUNTY OF LOS ANGELES,

Petitioners,

VS.

VAN DAVIS, HERSHEL CLADY, and FRED VEGA, individually and on
behalf of all others similarly situated; WILLIE C. BURSEY,
ELIJAH HARRIS, JAMES W. SMITH, WILLIAM CLADY,
STEPHEN HAYNES, JIMMIE ROY TUCKER, LEON
AUBRY, RONALD CRAWFORD, JAMES HEARD,
ALFRED R. BALTAZAR, OSBALDO A. AM-
PARAH, individually and on behalf
of all others similarly situated,

Respondents.

BRIEF AMICUS CURIAE FOR PACIFIC LEGAL FOUNDATION IN SUPPORT OF ~~RESPONDENTS~~ PETITIONERS

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PARAH, individually and on behalf
of all others similarly situated,
Respondents.

BRIEF AMICUS CURIAE FOR PACIFIC LEGAL FOUNDATION
IN SUPPORT OF ~~RESPONDENTS~~ PETITIONERS

INTEREST OF AMICUS

This brief *amicus curiae* is respectfully submitted
on behalf of *amicus curiae* Pacific Legal Foundation
(PLF) pursuant to Supreme Court Rule 42. Consent
to the filing of this brief has been granted by counsel
for both parties and has been filed with the clerk.

PLF is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

PLF, due to its unique public interest perspective, believes that it can provide this Court with a more complete argument of the public interest at stake in establishing a standard of proof required for actions alleging violations of 42 U.S.C. § 1981.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals in *Davis v. County of Los Angeles* is reported at 566 F.2d 1334 (9th Cir. 1977).

INTRODUCTION

The facts of this case, as set forth in petitioners' opening brief and herein adopted, raise several important issues. Of these, the issue of the standard of proof required to show discrimination in violation of

42 U.S.C. § 1981¹ is of vital importance with respect to the public interest. The context in which this issue arose was an alleged violation of Section 1981 by the Los Angeles County Fire Department, which used a general aptitude test to screen applicants for firefighter positions with the department. At trial, the plaintiffs presented statistical evidence which showed that this testing procedure had an adverse impact on black and Mexican-American applicants. The district court specifically found that:

"[n]either the defendants nor their officials had engaged in employment practices with a willful or conscious purpose of excluding blacks and Mexican-Americans from employment at the Los Angeles County Fire Department." *Davis v. County of Los Angeles*, 8 F.E.P. Cases 239, 241 (C.D. Cal. 1973).

Nonetheless the court concluded that the statistical data alone established a *prima facie* case of racial discrimination which defendants were unable to rebut and ruled in favor of plaintiffs. *Davis v. County of Los Angeles*, 566 F.2d 1334, 1337 (9th Cir. 1977).

This judgment was appealed and the court of appeals affirmed the trial court's findings. However, a rehearing was granted following this Court's decision

¹Section 1981 provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

in *Washington v. Davis*, 426 U.S. 229 (1976), in order to determine whether that case required that plaintiffs show discriminatory motivation or intent in order to make out a *prima facie* case of employment discrimination under Section 1981. On rehearing, the court of appeals held that there was no indication in *Washington v. Davis* that discriminatory intent or motive had to be present in Section 1981 cases. Further, the court again agreed with the district court that statistical evidence of adverse impact upon minorities of the challenged procedures was sufficient to establish a *prima facie* case of employment discrimination under Section 1981.

In holding that under Section 1981, plaintiffs, to make out a *prima facie* case of employment discrimination need only show that the challenged practices have a discriminatory impact on minorities, the court of appeals relied on the standard for burden of proof set forth in Title VII cases (*Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)), and rejected the standard set forth for constitutional cases, *i.e.*, that plaintiffs must show the challenged practices have a discriminatory intent (*Washington v. Davis*, 426 U.S. at 229). Specifically, the court held that "there remains no operational distinction in this context between liability based upon Title VII and Section 1981." *Davis v. County of Los Angeles*, 566 F.2d at 1340.

The significance of the Ninth Circuit Court of Appeals' determination that the Title VII standard of disproportionate impact of challenged practices upon minorities is sufficient to establish a *prima facie* case

of employment discrimination under 42 U.S.C. § 1981 is enormous. Because Section 1981 does not mandate the procedural prerequisites required in Title VII challenges to employment practices, the court's decision foreshadows increased challenges to numerous racially neutral employment procedures. Further, because of the broad sweep of Section 1981 (*see*, for example, *Runyon v. McCrary*, 427 U.S. 160 (1976)), and because of its parallels to the Fourteenth Amendment, this decision has the potential for impact beyond the employment field and for laying the groundwork for challenges to many other neutral private and governmental actions which may be more burdensome to minorities than to others. *Davis v. County of Los Angeles*, 566 F.2d at 1348-50 (dissenting opinion). This possibility was addressed in *Washington v. Davis*, 426 U.S. at 248, in the context of Fifth and Fourteenth Amendment challenges to employment practices and was noted by this Court as a reason for requiring a showing of discriminatory intent to establish a *prima facie* case in these challenges. In effect, by removing this requirement from Section 1981 challenges, the court of appeals has increased dangers which this Court seemingly sought to prevent in *Washington v. Davis*.

Further, were the Ninth Circuit decision allowed to stand, governmental entities (and therefore taxpayers) could be subjected to court imposed heavy monetary penalties without regard to intent to discriminate—or even where the entity has made the maximum affirmative action effort but failed to attain

the "proper" numbers. In addition, the Ninth Circuit ruling could justify the imposition of reverse discrimination quotas in any case of statistical disparity. The imposition of penalties without fault raises substantial questions of violation of due process of law while quotas without fault raise equal protection of the laws questions.

The decision of the court of appeals which raises these issues was apparently taken without an in-depth analysis of either Section 1981 or this Court's ruling in *Washington v. Davis*. Had such an analysis been made, it would be apparent that not only *Washington v. Davis*, but also the legislative history of Section 1981, the differences between Title VII and Section 1981, and the modern scope and usage of Section 1981 all require that the burden of proof for a *prima facie* case of racial discrimination brought under Section 1981 be the same as that for cases brought under the Constitution.

ARGUMENT

THE CONSTITUTIONAL STANDARD OF PROOF MUST BE APPLIED IN ACTIONS ALLEGING VIOLATIONS OF 42 U.S.C. § 1981

A. Actions Brought Under Title VII and Section 1981 Are Separate and Distinct

The court of appeals' holding that Section 1981 actions must parallel those of Title VII and that there is "no operational distinction . . . between liability based upon Title VII and Section 1981" was

apparently based upon reasoning that Section 1981 is a bar to employment discrimination and that this Court "has recognized that Title VII and § 1981 embrace 'parallel or overlapping remedies against discrimination.' *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 & n. 7" *Davis v. County of Los Angeles*, 566 F.2d at 1340.

The fact that Section 1981, as well as Title VII, may be used as a bar to employment discrimination is indisputable. However, the appellate court's reliance on this Court's statement in *Alexander v. Gardner-Denver Company* is misplaced. This Court there stated that: "legislative enactments in this area have long evidenced a general intent to accord parallel or overlapping remedies against discrimination." *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 47 (1974).²

This Court made no suggestion that Title VII and Section 1981 are parallel or overlapping, the reference is to Sections 1981 and 1983.³ However, even if the reference could be construed to apply to Title VII and Section 1981, it cannot stand as precedent for a ruling that the two enactments require the same standards for a *prima facie* case or that there can

²"See e. g., 42 USC § 1981 (Civil Rights Act of 1866); 42 USC § 1983 (Civil Rights Act of 1871)." *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 47 n.7.

³If this reference is to be read to mean that parallel or overlapping remedies must have the same burden of proof, it should be noted that Section 1983, which is specifically mentioned, has been noted to require a showing of discriminatory intent. *Lewis v. Bethlehem Steel Corp.*, 440 F. Supp. 949, 963-64 (D. Mo. 1977).

be no "operational distinction" between the two. In *Alexander v. Gardner-Denver Company* the reference was made solely in support of a holding that the existence of Title VII does not deny plaintiffs other rights and remedies they may have against discrimination in private employment. In fact this Court continues to point out that "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Id.* at 48-49.

Further, in *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-63 (1975), this Court reaffirmed the existence of these supplemental remedies, but pointed out that they are not coextensive. This Court therein concluded its discussion of Title VII and Section 1981 by stating:

"[T]he remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." *Johnson*, 421 U.S. at 461.

The dissenting opinion in *Davis v. County of Los Angeles*, 566 F.2d at 1348, cogently points to the fallacy of the majority's reasoning when it observes:

"That both statutes [Section 1981 and Title VII] can apply to the same facts and that both may afford similar remedies is beside the point. The same can be said of Title VII and the Fourteenth Amendment, yet, after *Washington v. Davis*, there remains an essential 'operational distinction' between them."

This distinction between Title VII and Section 1981 manifests itself when the scope of the two statutes is studied. Title VII was enacted in 1964 to deal with discrimination in employment. The Court, in addressing the purpose of this statutory remedy, has stated:

"The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of *employment opportunities* and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. at 429-30 (emphasis added).

Section 1981 is not so limited to one area of discrimination, nor was it intended to achieve a narrow goal. The purpose of the Civil Rights Act of 1866 from which Section 1981 is derived has been described by this Court: "to secure to all citizens of every race and color, and without regard to previous servitude, those *fundamental rights which are the essence of civil freedom*." *Civil Rights Cases*, 109 U.S. 1, 22 (1883) (emphasis added).

Viewing the two statutes in comparison, convergent only in the area of employment discrimination and widely divergent in all other areas of discrimination, it is difficult to imagine how the same standard of proof could be applicable to both. Even in the narrow area of employment, these two remedies for the same ill may be parallel and overlapping without operating identically. Certainly, because of the proce-

dural prerequisites involved under Title VII, every plaintiff who meets Section 1981 standards, even as the court of appeals describes them, would not be able to bring a successful Title VII suit. (*See Johnson v. Railway Express Agency*, 421 U.S. at 460.)

These procedural prerequisites of Title VII suits, including the exhaustion of administrative remedies, "tend to eliminate claims that are frivolous or suffering from obvious legal or factual defects [and] it is not unreasonable to provide that a *prima facie* case may be established without a showing of discriminatory intent." *Davis v. County of Los Angeles*, 566 F.2d at 1350 (dissenting opinion). Fourteenth Amendment actions lack the procedural protections against obviously defective cases; however, protection is provided by the requirement of proof of discriminatory motivation behind challenged practice before a *prima facie* case can be established. If Section 1981 is interpreted in the manner set forth by the Ninth Circuit, cases brought under this section will have neither of the screening devices of Title VII and the Fourteenth Amendment. This factor standing alone is sufficient to require that Section 1981 standards of proof parallel those of the Fourteenth Amendment. In addition, because of the fact that Section 1981 actions are extremely similar to those of the Fourteenth Amendment and in light of the fact that this Court has already prescribed the standards for the Fourteenth Amendment in *Washington v. Davis*, there is ample indication that discriminatory motivation must be part of the *prima facie* case under Section 1981. Were this not the case:

"In the vast array of cases such as the one before us now and *Washington v. Davis* itself, where Title VII does not apply but Section 1981 and the Fourteenth Amendment do, one could easily avoid the intent requirement of the Amendment by simply pleading section 1981." *Davis v. County of Los Angeles*, 566 F.2d at 1350 (dissenting opinion) (footnote omitted, citation omitted).

It appears quite likely that this Court itself considered this problem in *Washington v. Davis* when it indicated that the extension of Title VII standards beyond Title VII must await specific legislative action. *Id.* at 248.

B. The History of Section 1981 Mandates a Constitutional Standard of Proof

Justice Stevens, concurring in *Washington v. Davis*, 426 U.S. at 255, stressed the impropriety of transplanting Title VII standards into another statute without an examination of that statute's legislative history. Similarly, the dissent in *Davis v. County of Los Angeles* indicated:

"The proper inquiry is whether the legislative history of Section 1981 indicates that it should track the Fourteenth Amendment's standards of proof rather than those of Title VII. I believe that the history of Section 1981 strongly suggests precisely that." *Id.* at 1348.

The history of Section 1981 does more than suggest that Section 1981 tracks the Fourteenth Amendment. It suggests that it was the direct progenitor of the Fourteenth Amendment.

The Thirteenth Amendment was ratified and adopted in December of 1865 abolishing slavery and involuntary servitude. Further, it granted to Congress the power to make its provisions effective by appropriate legislation. Thirteenth Amendment, Section 2. Under the auspices of this power of enforcement, the legislature enacted the Civil Rights Act of 1866 securing "[t]o all persons within the United States practical freedom." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 431-32 (1968), *quoting from*, 39th Cong., 1st Sess. 43, 474-75. The "practical freedom" guaranteed by this Act was the right to make and enforce contracts; the rights to buy, sell, and own realty and personalty; the right to sue, be parties, and give evidence; and the right to full and equal benefit of all laws and proceedings for the security of persons and property. E. Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323, 1326 (1952) (hereinafter *History*).

Because of the extent of controversy over the constitutionality of this Act, some adverse court decisions, and the feeling by some advocates of the Act that it should be placed beyond the power of subsequent congressional action, the provisions of the Civil Rights Act of 1866 were cast in the mold of a new constitutional provision, the Fourteenth Amendment. *History* at 1328-29. Congressional speakers addressing the purpose of Section 1 of the Fourteenth Amendment made it quite plain that it was designed to make certain that the Civil Rights Act of 1866 was constitutionally valid (*History* at 1331), and a comparison between the language of Section 1 of the Fourteenth Amendment and

the Civil Rights Act of 1866 demonstrates that this constitutionality was guaranteed by enacting the Civil Rights Bill into the Constitution itself. Further indications of this equality between amendment and statute are found in the language making all citizens born or naturalized in the United States "citizens of the United States and of the State wherein they reside," found in the Fourteenth Amendment and drawn from the 1866 Act. Additionally, the "privileges and immunities clause" also was drawn from the Act. *History* at 1333.

The Fourteenth Amendment was subsequently ratified on July 28, 1868, and on May 31, 1870, a new Civil Rights Act was passed. This statute was a reenactment of the 1866 Act "under the belief that whatever doubts may have previously existed as to constitutional validity were now removed by the Fourteenth Amendment." *History* at 1333-34. (See also *United States v. Wong Kim Ark*, 169 U.S. 649, 674-76 (1898).) The language of Section 1981, the modern codification of the Civil Rights Acts of 1866 and 1870, still contains most of the original language and still vindicates "those fundamental rights which appertain to the essence of citizenship." *Civil Rights Cases*, 109 U.S. at 22.

The import of the history of Section 1981 is obvious. This history shows that the Fourteenth Amendment and Section 1981 share not only a common heritage, but common language and purpose as well. These factors strongly suggest that actions brought under Section 1981 and the Fourteenth Amendment must be treated in a similar manner and that the burden of

proof for a *prima facie* case under each must be the same.

Even apart from the genealogical connection with the Fourteenth Amendment, an examination of Section 1981 alone indicates that discriminatory motivation must be shown in order to indicate a statutory violation. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), this Court explored the language and history of the Civil Rights Act of 1866 in order to determine whether Section 1982 applied to private actions. After examining the 1866 Act, the Court indicated:

“[T]he structure of the 1866 Act, as well as its language, points to the conclusion urged by the petitioners in this case—that § 1 was meant to prohibit *all* [emphasis in original] racially motivated [emphasis added] deprivations of the rights enumerated in the statute, although only those deprivations perpetrated ‘under color of law’ were to be criminally punishable under § 2.” *Id.* at 426.

Although it is recognized that this statement in *Jones v. Alfred H. Mayer Co.* is *dicta* on the issue of discriminatory intent under the 1866 Act: “it is an expression of the Court’s reading of the statute” (*Lewis v. Bethlehem Steel Corp.*, 440 F. Supp. 949, 964-65 (D. Mo. 1977)), and significant in this case since Section 1981, like Section 1982, is derived from Section 1 of the Civil Rights Act of 1866, *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 422-23, n.28. This reading of the statute, when combined with its relationship to the Fourteenth Amendment, demonstrates that discriminatory intent behind challenged actions is a prime ingredient of a *prima facie* case brought under Section 1981.

C. The Scope of Section 1981 Dictates a Showing of Discriminatory Intent

In assessing the dangers of applying Title VII discriminatory impact standards in constitutional cases, the Court in *Washington v. Davis*, 426 U.S. at 248, observed:

“A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.”

Although this comment is directed to cases brought under the Fifth or Fourteenth Amendments, it is also applicable to potential problems should the showing of discriminatory intent requirement be abandoned in Section 1981 cases.

While it is true that the case at bar goes no further than dispensing with proof of discriminatory intent in Section 1981 public employment cases (*Davis v. County of Los Angeles*, 566 F.2d at 1340), Section 1981, like the Fifth and Fourteenth Amendments, extends far beyond the public employment field and is available as a remedy in a multiplicity of cases when public or private discrimination based upon race is alleged.⁴ The

⁴Section 1981 has been held to prevent discrimination: in the admittance to hospitals (*United States v. Medical Society of South Carolina*, 298 F. Supp. 145 (D.S.C. 1969)); in the activities of labor unions (*Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 993 n.26 (D.D.C. 1973)); in access to libraries (see *Kerr v.*

Ninth Circuit's holding foreshadows an end to proof of discriminatory intent in all these cases. Such a holding is fraught with the same dangers which this Court sought to avoid in *Washington v. Davis*⁵ and with the additional dangers inherent in the fact that Section 1981, unlike the Fifth and Fourteenth Amendments, can be utilized to challenge private as well as public actions.

An example of the problems which might arise is given by *Jefferson v. Hackney*, 406 U.S. 535 (1972). In that case, bare statistical evidence revealed that there was an adverse impact upon black and Mexican-American recipients of Aid to Families with Dependent Children (AFDC) created by a Texas constitutional provision placing a ceiling on the amount which could be spent on welfare assistance grants. Because this constitutional ceiling was insufficient to grant the full amount to all welfare assistance recipients, the state reduced, by a certain percentage, the amount of grants

Enoch Pratt Free Library of Baltimore City, 149 F.2d 212 (4th Cir. 1945), cert. denied, 326 U.S. 721 (1945)); in access to private schools (*Runyon v. McCrary*, 427 U.S. 160, 173-74 (1976)); and in the right to equal service in restaurants (*Hernandez v. Erlenbusch*, 368 F. Supp. 752, 755 (D. Ore. 1973)).

⁵Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 Calif. L. Rev. 275, 300 (1972), cited by this Court in *Washington v. Davis*, 426 U.S. 229, 248 n.14 (1976), indicates that neutral tests and qualifications for government conferred benefits and opportunities, such as voting, draft deferment, public employment, and jury service, would be invalidated by a discriminatory impact test under the Fourteenth Amendment. Also open to challenge would be "[s]ales taxes, bail schedules, utility rates, bridge tolls, license fees and other state imposed charges [which] are more burdensome to the poor than to the rich, and hence more so to the average black than to the average white." Most, if not all of these, would be challengeable under Section 1981 as well as the Fifth or Fourteenth Amendments.

under the various programs. The largest reduction was in the AFDC area which, coincidentally, had the highest number of minority recipients.

The plaintiffs argued that such an action deprived them, among other things, of their constitutional rights under the Fourteenth Amendment. This Court noted that statistical inequalities did not automatically result in invidious racial discrimination and observed:

"The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive." *Jefferson*, 406 U.S. at 548.

It was thus held that plaintiffs could not prevail in their Fourteenth Amendment challenge since the reduction classifications were rational. The quote above embodies reasoning similar to that elucidated in *Washington v. Davis*, 426 U.S. at 248.

Had the plaintiffs in *Jefferson* presented a Section 1981 claim, and this section were to be construed as suggested by the Ninth Circuit, it is possible that plaintiffs while failing on their Fourteenth Amendment claim could have succeeded on their Section 1981 claim. The fears expressed by this Court in *Jefferson* would then have been realized, and indeed could yet be realized if new claims, which could be based on the Fourteenth Amendment or Section 1981, are brought under Section 1981 alone.

D. *Washington v. Davis* and Federal Court Decisions Construing *Washington v. Davis* Indicate that Section 1981 Requires a Constitutional Standard of Proof

In *Davis v. County of Los Angeles*, 566 F.2d at 1340, the court of appeals read *Washington v. Davis* as having no bearing on the Section 1981 claims involved in this case. Because of the parallels between Section 1981 and the Fourteenth Amendment, discussed above, it is submitted that this reasoning is incorrect. However, it also submitted that it is erroneous in that this Court in *Washington v. Davis* appears to have implicitly decided the Section 1981 question.

In *Washington v. Davis*, plaintiffs-respondents challenged employment practices on both constitutional (Fifth Amendment) and statutory (Section 1981 and District of Columbia Code § 1-320) grounds and asserted, among other things, that a preemployment test was invalid insofar as it had a discriminatory impact on black applicants. The case below was heard on motions for summary judgment with all the parties and courts assuming that Title VII standards regarding burden of proof applied, *i.e.*, all that was necessary for a plaintiff to make out a *prima facie* case of employment discrimination was a showing of discriminatory impact of the challenged practices. This Court disagreed with that assumption. Although the Court primarily discussed the inapplicability of Title VII standards of proof for a *prima facie* case of discrimination in constitutional cases, it observed that "[r]espondents were entitled to relief on neither constitutional nor statutory grounds." *Washington v.*

Davis, 426 U.S. at 248. The Court then proceeded to uphold the judgment of the district court which had granted defendant-appellants' motion for summary judgment. This motion had asserted that plaintiffs were entitled to relief on neither statutory nor constitutional grounds. *Id.* at 234.

In his concurring opinion Justice Stevens states his view that the Court's ruling regarding the inapplicability of Title VII standards applied to Section 1981 claims as well as those based on the Constitution:

"Since the Court of Appeals set aside the portion of the District Court's summary judgment granting the defendants' motion, I agree that we cannot ignore the statutory claims even though, as the Court makes clear, *ante*, at 238 n 10, there is no Title VII question in this case. The actual statutory holdings are limited to 42 USC § 1981 and § 1-320 of the District of Columbia Code, to which regulations of the Equal Employment Opportunity Commission have no direct application." *Id.* at 255.

When Justice Stevens' observations are read along with the holding of the majority, it is apparent that the Court was extending its constitutional ruling to include Section 1981. This conclusion is eminently logical when it is noted that Section 1981 parallels and guarantees constitutional rights similar to those of the Fourteenth Amendment.

Further, as discussed above, this Court clearly evidenced its concern in regard to the consequences which could follow if Fourteenth Amendment chal-

lenges to practices affecting the races unequally were allowed to go forward without a showing of discriminatory intent. *Washington v. Davis*, 426 U.S. at 248. After assessing these consequences, the Court continued:

"[I]n our view, extension of the rule [that a statute designed to serve neutral ends is invalid if it benefits one race more than another] beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription." *Id.*

This strongly suggests that the Court wished to confine the Title VII standards solely to Title VII proceedings or those future situations in which the standards had been specifically authorized by the legislature. Actions under Section 1981 do not fall into this category.

It is significant to note that, following *Washington v. Davis*, a number of federal courts, including the Third, Seventh, and Eighth Circuits,⁶ have indicated that that case necessitates a showing of intentional discrimination for a *prima facie* case under Section 1981. In *Arnold v. Ballard*, 448 F. Supp. 1025 (N.D. Ohio 1978), which was remanded to the district court specifically for reconsideration in light of *Washington v. Davis*, the court expressly rejected the reasoning of *Davis v. County of Los Angeles* and held:

⁶*Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977), cert. denied, 46 U.S.L.W. 3541 (1978); *City of Milwaukee v. Sarbe*, 546 F.2d 693 (7th Cir. 1976); *Johnson v. Alexander*, _____ F.2d _____, 16 F.E.P. Cases 894 (8th Cir. 1978).

"The legislative history of section 1981, prior Supreme Court opinions dealing with the Civil Rights Act of 1866, e. g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), and *Washington v. Davis* can be harmonized only by a holding that proof of discriminatory purpose is required for employment discrimination claims under section 1981." *Ballard*, 448 F. Supp. at 1028.

Such a holding appears eminently logical and correct.

CONCLUSION

The Ninth Circuit Court of Appeals decision that a showing of adverse impact is sufficient to make out a *prima facie* case of employment discrimination under Section 1981 is seriously deficient. It made no search of the history of Section 1981. It failed to note the different nature and scope of Section 1981 and Title VII. Most seriously it failed to comprehend the purpose of the requirement of a showing of intent in constitutional challenges to discriminatory practices.

Intentional racial discrimination should never be condoned. However, whenever discrimination is charged, it is necessary to ensure that the rights of all parties are protected and that innocent people are not, themselves, discriminated against. The means of ensuring that these rights are protected is by requiring the showing of discriminatory intent or moti-

vation. In light of this and for the reasons set forth above, *amicus curiae* Pacific Legal Foundation urges this Court to find that 42 U.S.C. § 1981, like its constitutional analogs, the Thirteenth and Fourteenth Amendments, requires a showing of discriminatory intent or motivation.

Respectfully submitted,

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September, 1978

MOTION FILED
SEP 2 1978

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1978

No. ~~87~~-1553

COUNTY OF LOS ANGELES; BOARD OF
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Petitioners,

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VAN DAVIS, HERSHAL CLADY and FRED
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HARRIS, JAMES W. SMITH, WILLIAM CLADY,
STEPHEN HAYNES, JIMMIE ROY TUCKER,
LEON AUBRY, RONALD CRAWFORD, JAMES
HEARD, ALFRED R. BALTAZAR, OSBALDO
A. AMPARAH, individually and on behalf of
all others similarly situated,

Respondents.

MOTION OF CALIFORNIA ORGANIZATION OF
POLICE AND SHERIFFS, INC. FOR LEAVE TO
FILE BRIEF AS AMICUS CURIAE AND BRIEF
OF CALIFORNIA ORGANIZATION OF POLICE
AND SHERIFFS AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE AND BRIEF OF
CALIFORNIA ORGANIZATION OF
POLICE AND SHERIFFS

Pursuant to Rule 42 of the United
States Supreme Court, the California Organiza-
tion of Police and Sheriffs, Inc., a labor organ-
ization consisting of the San Francisco Police

Officers Association, the Anaheim Police Associ-
ation, the Burbank Police Officers Association,
the Compton Police Officers Association, the
Glendale Police Officers Association, the Ingle-
wood Police Association, the Long Beach Police
Officers Association, the Novato Police Officers
Association, the Santa Ana Police Benevolent
Association, the Signal Hill Police Association,
the Hawthorne Police Association, the Hermosa
Beach Police Association, the Montebello Police
Association, the Napa Police Association, the
Santa Monica Police Association, the Benicia
Police Association, the Bell Gardens Police Offi-
cers Association, the Half Moon Bay Police Offi-
cers Association, the Huntington Park Police
Officers Association, the Huntington Beach Po-
lice Officers Association, the Redondo Beach
Police Officers Association, the San Mateo Po-
lice Officers Association, the Santa Clara Po-
lice Officers Association, and the Yolo County
Sheriffs Association. The membership of each

of these Associations consists of sworn police officers or sheriffs employed by local public agencies throughout the State of California. The issues involved in County of Los Angeles, et al. v. Van Davis, etc., et al., are of the greatest importance to police officers throughout the State. This case pertains to the standards of burdens of proof necessary to establish violations of Constitutional and statutory guarantees to equal employment. Each of the police and sheriff organizations within the California Organization of Police and Sheriffs is required by law to adhere to the statutory provisions guaranteeing equal employment and promotional opportunities within their respective local public agencies. In order to comply with Constitutional and statutory guarantees to equal employment, there must be a clearly delineated standard for burdens of proof in 1981, 1983 and Title VII litigation.

The primary interest of the California Organization of Police and Sheriffs is employer-

employee relations. The California Organization of Police and Sheriffs leads the vanguard in the State of California in this area as it pertains to sworn peace officers.

The amicus curiae brief raises Constitutional issues not explicitly argued by counsel for the County of Los Angeles who consents to this brief being submitted. In its brief, County of Los Angeles argues that proof of purposeful racial discriminatory intent is required to establish a cause of action for employment discrimination under 42 U.S.C. § 1981. The amicus brief directs itself to the Constitutional issues of whether or not a racial quota can be imposed without a specific finding of intentional discrimination pursuant to 42 U.S.C. § 2000e-5 (g) and whether a court can impose a racial quota without a specific demonstration that no other remedy is available to rectify the past discriminatory practices. The arguments made in the amicus curiae brief are central to the disposition of this matter

and will not otherwise be before this Court.

It is the contention of this amicus curiae brief that the remedy of a racial quota imposed for a violation of Title VII without a finding of intent is impermissible under 42 U.S.C. § 2000e-5 (g). Without a demonstration of purposeful intent, the imposition of a racial quota exceeds the equitable jurisdiction of the District Court and is an abuse of discretion.

WHEREFORE, the California Organization of Police and Sheriffs respectfully requests this Court to permit the filing of the brief amicus curiae which is submitted herewith.

Respectfully submitted,

STEPHEN WARREN SOLOMON, INC.

By 

STEPHEN WARREN SOLOMON

By 

RALPH B. SALTSMAN

Attorneys for California Organization
of Police and Sheriffs, Inc.

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BRIEF AMICUS CURIAE FOR
CALIFORNIA ORGANIZATION OF
POLICE AND SHERIFFS, INC.

California Organization of Police and
Sheriffs hereby submit the brief for consideration
by this Court in review of the judgment of the Uni-
ted States Court of Appeal for the Ninth Circuit

entered on this proceeding on December 14, 1977.

OPINIONS BELOW

The opinion of rehearing of the United States Court of Appeals for the Ninth Circuit is reported in Van Davis, et al. v. County of Los Angeles et al, 566 F.2d 1334 (9th Cir. 1977). This case is printed as Appendix A, page 1 in the petition for writ of certiorari submitted by petitioners in this matter. The unreported original opinion of the Circuit Court is printed as Appendix B thereto. The judgment and findings of the District Court are printed as Appendices C, and D, respectively to the petition for writ of certiorari.

JURISDICTION

The opinion and judgment were entered on December 14, 1977. A petition for rehearing was filed by respondents, Van Davis, et al. (plaintiffs-appellants below), which was denied on January 30, 1978.

Jurisdiction of the District Court was based on 28 U.S.C. § 1343.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and Rule 19(1)(b).

QUESTION PRESENTED

Is the imposed remedy consisting of racial quotas for a violation of Title VII permissible pursuant to 42 U.S.C. § 2000e-5(g) where there is no finding of intentional discrimination?

Is the imposition of a racial quota where there is no demonstration of purposeful intention an appropriate remedy available to the District Court, or does the District Court exceed its equitable jurisdiction in fashioning such a remedy?

CONSTITUTIONAL ISSUES AND STATUTES INVOLVED

1. The Fifth and Fourteenth Amendments to the United States Constitution; in particular, the due process and equal protection clauses thereof;

2. The following provisions of the United States Code:

42 U.S.C. § 2000e-5(g) (injunctions- re-

instatement-backpay):

"If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the Court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate. . . . "

ARGUMENT

I.

A REMEDY OF RACIAL QUOTAS IMPOSED FOR A VIOLATION OF TITLE VII WITHOUT A FINDING OF INTENT IS IMPERMISSABLE UNDER 42 U.S.C. § 2000e-5(g)

42 U.S.C. § 2000e-5(g) provides in pertinent part:

"If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the Court

may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay" (emphasis added.)

The District Court of Appeal in Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977) noted that the District Court "found that the Los Angeles County Fire Department employed blacks and Mexican-Americans grossly out of proportion to their number in the population of Los Angeles County." There was never a judicial determination that there was a showing that the defendants "administered the 1972 examination with any intent or purpose to discriminate against minority applicants." (page 1338.)

Although this Court, and the Circuit Courts of Appeal, have consistently recognized

the equitable relief available to District Courts in fashioning remedies for violations of Title VII, this Court in Franks v. Bowman Transportation Co., 4024 U.S. 747, 47 L.Ed.2d 444, 96 S.Ct. 1251 (1976) significantly differentiated between the definitional provisions of Title VII and the remedial provisions of Title VII:

"On its face, § 703(h) appears to be only a definitional provision; as with the other provisions of § 703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not. § 703(h) certainly does not expressly purport to qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII, § 706(g), 42 U.S.C. § 2000e-5(g) [42 U.S.C.S. § 2000e-5(g)], in circumstances where an illegal discriminatory

act or practice is found."

Other cases have duly recognized the obligation of the trial court to determine the existence of intentional unlawful employment practices pursuant to § 2000e-5(g).

The Court in Evans v. Sheraton Park Hotel, 503 F.2d 177 (D.C. 1974) found that the District Court in that matter did overcome the hurdle of finding intentional unlawful employment practices prior to employing its discretionary authority a scheme of affirmative action required to remedy those unlawful employment practices. The Court in Evans, supra, held:

"Having found intentional unlawful employment practices, 42 U.S.C. § 2000e-5(g) vests in the District Court discretionary authority to order, as part of the affirmative action necessary to obviate such unlawful employment practices, that the party

responsible pay to the aggrieved person backpay damages. . . ."

The District Courts, and the Courts of Appeal, have, from time to time, ignored the requirement of a finding of intent before fashioning an equitable remedy in Title VII cases. (See United States v. City of Chicago, 49 F.2d 415 (7th Cir. 1977).

The error committed by the Court in United States v. Chicago, supra, and those Circuit Courts of Appeal cited therein, has been made repeatedly. This Court, has rendered decisions considering the propriety of remedial relief proposed by District Courts in Title VII cases, without squarely deciding the issue presented herein. The rule which has evolved concerning the burden of proof in Title VII cases, ignores the clear and plain legislative statement by Congress in its adoption of § 2000e-5(g).

This Court in Washington v. Davis, 426 U.S. 229, 48 L.Ed.2d 597, 96 S.Ct. 240 (1976) cir-

cumvented the issue of the propriety of the burden of proof set forth in the remedial section within Title VII. In Washington, supra, at page 240, it was simply stated:

"As the Court of Appeals understood Title VII, employees or applicants proceeding under it need not concern themselves with the employer's possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion practices. This is not the Constitutional rule. We have never held that the Constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and would decline to do so today."

No court has recognized the literal read-

ing of § 2000e-5(g). This case, however, requires such a recognition. The question which must be answered is: may a District Court fashion equitable relief without a demonstration of intent pursuant to Title VII? The response must be in the negative.

The Court of Appeal in Robinson v. Lorillard Corporation, 444 F.2d 791 (4th Cir. 1971) held that:

"Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."

The Court in Robinson, supra, relied on this Court's decision in Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) wherein it was stated:

"Under the Act, practices, procedures, or tests neutral on

their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

This Court continued:

"Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." (91 S.Ct. at 853.)

In reading Griggs, supra, however, it must be understood that the Court therein did not condone the use of racial quotas, and in fact issued a policy statement limiting the use of quotas:

"Congress did not intend by Title VII however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because

he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."

It is not the contention of amicus curiae herein to circumvent the holding of Griggs, supra, as to discriminatory intent, but to seek recognition of the concept that absent a clear demonstration of actual intent, the imposition of a remedy as disruptive as a racial quota, is not within the province of the trial court.

In Local 189, United Paper Mak and Paper Work v. United States, 416 F.2d 980 (5th Cir. 1969) the Court discussed the necessity of a finding that an employer has intentionally engaged in an unlawful employment practice. The Court stated:

"§ 706(g) limits injunctive
(as opposed to declaratory) relief

to cases in which the employer or union has 'intentionally engaged in' an unlawful employment practice. Again, the statute, read literally, requires only that the defendant meant to do what he did, that is, his employment practice was not accidental."

The Court in Local 189, United Paper Mak and Paper Work, supra, continued:

"Here, as in Dobbins, the conduct engaged in had racially-determined effects. The requisite intent may be inferred from the fact that the defendants persisted in the conduct after its racial implications had become known to them."

In Paper Mak, supra, intention was found by implication. In the case at bar, intention was ignored altogether.

It is the position of amicus curiae that where a racial quota is to be imposed, actual demonstrable intent must be established by the evidence. Intent by implication is insufficient for such relief to be imposed; intent by inference is insufficient for such relief to be imposed; and circumvention of the statutory requirement of intention altogether is unlawful.

II.

WITHOUT A SUBSTANTIAL DEMONSTRATION
THAT A LESS ONEROUS REMEDY WOULD
ALLEVIATE THE DAMAGE TO PLAINTIFFS
THE IMPOSITION OF RACIAL QUOTAS IS
AN ABUSE OF DISCRETION AS A MATTER
OF LAW

The imposition of a racial hiring quota is the most devastating device that can be imposed by the Courts in the United States of America, both to the person passed over for public employment and the citizen requiring effective emergency service. It on its face favors one person over another because of the color of their skin or race as opposed to merit and ability. People in burning buildings,

heart attack victims lying on the street, and small children stuck in treetops care not what the race or color of their fire department rescuers are but only hope and pray for effective and efficient public assistance.

Racial quotas are on their face judicial acts of court approved invidious discrimination and create a judicial suspect classification requiring a compelling justification allowing their use. Regents of the University of California v. Bakke, ___ U.S. ___ 98 S.Ct. 2733, 2748 (1978).

This Court has given approval to the Court of Appeal cases wherein District Courts have imposed racial quotas in employment discrimination cases. Bridgeport Guardians, Inc. v. Civil Service Commission, 482 F.2d 1333 (CA.2 1973), Carter v. Gallagher, 452 F.2d 315 (CA.8) modified on rehearing en banc, 452 F.2d 327 (CA.8 1972), but has not indicated upon what legal standards trial courts should exercise their discretion prior to the imposition of racial quotas or some other remedy. Regents

of the University of California v. Bakke, ___ U.S.

___ 98 S.Ct. 2733, 2754 (1978).

Racial hiring quotas should only be authorized when there is a demonstration to the Court that other less onerous remedies are not available and workable.

In the case at bar there was no evidence brought that other remedies would not be sufficient to vindicate any alleged suffering caused the plaintiffs.

Courts exercising legal discretion in imposing remedies for non-intentional acts of test discrimination should be required to evaluate their proposed remedy against a clear demonstrable standard. This standard should require an analysis of the following competing interest:

- a) Was the employer guilty of intentional acts of discrimination?
- b) Would monetary damages suffice?
- c) Would an order requiring racially neutral retesting open employment opportunities?

d) Would remedial educational and training programs upgrade the applicant's skills to pass entry level tests?

The Court below failed to make the distinction between the case where intentional acts of discrimination have been demonstrated and where there has been no such showing in fashioning a remedy unsurpassed in its devastating effects. Additionally, no demonstrable standard has been established to aid the Courts in fashioning equitable relief in Title VII cases. For these reasons and for the above reasons set forth this matter should be reversed and remanded for further findings consistent with a standard to be established by the United States Supreme Court in aiding the trial courts in effectuating appropriate remedies in Title VII cases where no intentional discrimination is found.

WHEREFORE, the California Organization of Police and Sheriffs respectfully request that the matter be reversed and remanded.

Respectfully submitted,

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Dated: September 1, 1978

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1553

Supreme Court, U. S.

FILED

NOV 1 1978

MICHAEL RODAK, JR., CLERK

COUNTY OF LOS ANGELES, *et al.*,

Petitioners,

—v.—

VAN DAVIS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF OF THE
AMERICAN CIVIL LIBERTIES UNION
AND THE ACLU OF SOUTHERN CALIFORNIA
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977
No. 77-1553

COUNTY OF LOS ANGELES, et al.,
Petitioners,
-v-
VAN DAVIS, et al.,
Respondents,

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE
AMERICAN CIVIL LIBERTIES UNION
AND THE ACLU OF SOUTHERN CALIFORNIA
AMICI CURIAE

Interest of the Amici*

The American Civil Liberties Union is a
nationwide, nonpartisan organization of over
200,000 members dedicated to defending the

* The parties have consented to the filing of this brief,
and their letters of consent have been filed with the Clerk
of the Court pursuant to Rule 42(2) of the Rules of this
Court.

fundamental civil rights and civil liberties of the people of the United States. The ACLU of Southern California is the ACLU's regional affiliate for Southern California.

Central among the fundamental rights and liberties guaranteed by our Constitution is the right not to be discriminated against on grounds of race or color. Because of the crucial importance of this long neglected and frequently subverted right in a free society, the ACLU, in a variety of cases before this Court and before numerous other tribunals, has defended the rights of those who have been discriminated against.

In such cases, the ACLU has consistently argued that Congress is empowered to enact broad legislation outlawing all forms of racial discrimination, whether racially motivated or not; that persons discriminated against should not be required to bear onerous burdens in proving scienter where it serves no justifiable purpose and where such a requirement merely facilitates and encourages retention of discriminatory practices which have no countervailing benefit whatsoever to an identified defendant or to society at large; and that affirmative remedial relief is constitutionally permissible if not equitably necessary to remedy the continuing

effects of past and present racial discrimination against minorities who continue to be denied the benefits of equality in a free society.

The issues in this case encompass each of these three concerns. Amici submit that Congress not only was empowered to but actually did enact legislation in the form of the Civil Rights Act of 1866 to prohibit all enumerated forms of racial discrimination regardless of whether that discrimination was motivated by an intent to discriminate. Amici also submit, in the event that this Court engrafts a scienter requirement which does not appear on the face of the statute and which is contrary to the legislative history of the 39th Congress, that plaintiffs in a §1981 case could be required to bear no more than a burden of producing evidence of deliberate disregard, and that plaintiffs here not only have met such a burden of production but also have satisfied a burden of persuasion despite the fact that such a burden is not theirs. Finally, Amici submit that, on the extensive evidence in the record before the trial court, the affirmative numerical hiring relief ordered by that court was constitutionally permissible as well as equitably required in order to remedy the pervasive effects of defendants' past discrimination against racial minorities.

INTRODUCTION AND SUMMARY OF ARGUMENT

The facts in this case pertaining to defendants' discriminatory employment practices for the most part are undisputed. "Despite a minority population of approximately 29.1% in Los Angeles County, only 3.3% of the firemen employed by the defendants at time of trial were black or Mexican-American." Davis v. County of Los Angeles, 556 F.2d 1334, 1337 (9th Cir. 1977). This result was accomplished through the use of unvalidated written tests which not only had a severely discriminatory impact, 556 F.2d at 1337, but also were known by defendants to have a discriminatory impact. (Pl.Ex.7,8,9; R.T.48-49)* This result also was accomplished, inter alia, through the use of a non job related 5'7" minimum height requirement which excluded 41% of the otherwise eligible Mexican-American applicants, 556 F.2d at 1341-1342, through the conduct of application programs designed to assist whites but not minorities to apply (R.T.91-113), through the temporary loss of the names of 300 minorities who wanted to apply (R.T.187-188), and through

* The citations to the record below, which has been lodged with this Court, are as follows: "Pl.Ex." refers to plaintiffs' exhibits; "R.T." means the recorded transcript; "R." refers to other portions of the record below.

the maintenance of a discriminatory reputation in the minority community (R.T.52,134,194).

Defendants for the most part do not contest these facts. But they do argue that 42 U.S.C. §1981 should not be interpreted, as the 39th Congress intended, to prohibit all enumerated forms of racial discrimination; they appear to argue that §1981 should be engrafted with a scienter requirement so onerous that their knowing use of discriminatory practices could not be proven unlawful under §1981; and they contend that the trial court exceeded its broad equitable authority by imposing affirmative relief to remedy their extensive past discrimination against blacks and Mexican-Americans. Amici believe that defendants are wrong on all counts.

A. Defendants first misconstrue the breadth and intent of 42 U.S.C. §1981, a statute which never has been curtailed or given a mechanical reading by this Court but which instead has been accorded "a sweep as broad as its language." Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968); See also, McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976); Runyon v. McCrary, 427 U.S. 160 (1976); Johnson v. Railway Express Agency, Inc., 421 U.S.

454 (1975); Tillman v. Wheaton-Haven Recreational Association, 410 U.S. 431 (1973); Sullivan v. Little Hunting Park, 396 U.S. 229 (1969). Its language, on its face, embodies no scienter requirement. Engrafting one now would be entirely inconsistent with this Court's interpretation of Title VII which on its face appears to require proof of intent to discriminate but which has been construed not to require proof of such intent. Griggs v. Duke Power Co., 401 U.S. 424 (1971). Moreover, it would be directly contrary to the intentions of the 39th Congress which identified numerous badges and incidents of slavery and thought that it had enacted legislation prohibiting not just intentional discrimination but all enumerated forms of racial discrimination whatever their source or motivation.

B. If this Court erroneously writes a scienter clause into 42 U.S.C. §1981 (thereby relegating the considerable efforts of the 39th Congress to the position of historical worthlessness in view of the subsequent ratification of the Fourteenth Amendment and enactment of the Civil Rights Act of 1871), this Court would have to decide whether defendants nonetheless have violated §1981 based on plaintiffs' proof "that a discriminatory purpose has been a moti-

vating factor" in defendants' challenged practices. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977). Although the precise degree of necessary mental culpability was not defined in Arlington Heights or in Washington v. Davis, 426 U.S. 229 (1976), it does not follow that any degree of mental culpability needs to be proved to establish a violation of §1981 in the circumstances of the instant case. The primary purpose of a scienter requirement, to provide a barrier against the unfair imposition of retroactive legal sanctions, is not furthered where plaintiffs seek prospective equitable relief and especially where defendants were on clear notice that their employment practices raised serious issues of racial unfairness. A secondary purpose of scienter, to protect individuals from being over-deterred from performing legitimate functions by a fear of strict liability, similarly is not served where defendants engage in employment practices which perpetuate racial exclusion but which fail to improve the quality of their workforce. Although no discernible purpose thus could be found for imposing a scienter requirement on §1981 here, plaintiffs nevertheless have sustained any production burden on this issue. And, although a burden

of persuasion on this issue, or on the issue of intent in general, could not logically be allocated to plaintiffs, they also met any such persuasion burden.

C. The record of identified past discrimination practiced by defendants provides a more than sufficient base for the affirmative hiring order imposed by the district court to remedy the pervasive effects of defendants' racial discrimination. As stated by Mr. Justice Powell in Regents of the University of California v. Bakke, 57 L.Ed.2d 750 (1978), once findings of past discrimination have been judicially rendered, "the governmental interest in preferring members of the injured groups at the expense of others is substantial." 57 L.Ed.2d at 782 (Powell, J.). See also, the opinion of Mr. Justice Brennan writing for himself and for Justices White, Marshall and Blackmun, 57 L.Ed.2d at 792-827 (Brennan, J.). In view of the positions taken by five members of this Court in Bakke, the affirmative hiring order here is constitutionally permissible and equitably necessary.

ARGUMENT

- A. The 39th Congress, in Seeking to Remove the Badges and Incidents of Slavery from Freedmen, Did Not Impose a Requirement of Proof of Scienter upon Plaintiffs Challenging Racially Discriminatory Employment Practices Pursuant to 42 U.S.C. §1981.

In Washington v. Davis, 426 U.S. 229 (1976), and in Arlington Heights v. Metro Development Housing Corp., 429 U.S. 252 (1977), this Court ruled that some degree of scienter must be proven in equal protection actions brought pursuant to §1 of the Fourteenth Amendment. Whatever the wisdom of such a construction of Section 1 of the Fourteenth Amendment, it is undisputed that Congress possesses the power to enact remedial legislation, aimed at discriminatory practices, which dispenses with any need to establish scienter. First, Congress may found such a remedial statute on its obligation to enforce the Thirteenth Amendment by eradicating all badges and incidents of slavery, including hiring practices which exclude minorities without materially advancing legitimate employment concerns. Johnson v. Railway Express Agency, 421 U.S. 454 (1975); see also, Runyon v. McCrary, 427 U.S. 160 (1976); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Second, Congress may found such a remedial statute on its power to regulate interstate commerce. Griggs v. Duke

Power Co., 401 U.S. 424 (1971) (Title VII of the Civil Rights Act of 1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (Title II of the Civil Rights Act of 1964). Finally, Congress may look to §5 of the Fourteenth Amendment as a source of power to enact broad prophylactic legislation extending beyond the contours of strict §1 liability. Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966); see also, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Accordingly, whether one views 42 U.S.C. §1981 as a statute enacted to enforce the Thirteenth Amendment, as a statute regulating interstate commerce, or as a statute to enforce the Fourteenth Amendment, Congress' power to concern itself with the disproportionate racial impact of a challenged practice is undisputed.

As this Court has repeatedly recognized, however, the Civil Rights Act of 1866, of which 42 U.S.C. §1981 is a part, was premised almost exclusively upon the Thirteenth Amendment. McDonald v. Santa Fe Transportation Co., 427 U.S. 273 (1976); Runyon v. McCrary, 427 U.S. 160 (1976); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975); Tillman v. Wheaton-Haven Recreational Association, 410 U.S. 431 (1973); Sullivan v. Little Hunting Park, 396

U.S. 229 (1966); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Section 2 of the Thirteenth Amendment, the Enabling Clause of that Amendment, "'clothed Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." Jones v. Alfred H. Mayer Co., 392 U.S. at 439 (emphasis in Jones) (citation omitted). Moreover, Congress was given "the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." Jones v. Alfred H. Mayer Co., 392 U.S. at 440.

The 39th Congress did just that by enacting, over President Andrew Johnson's veto, the Civil Rights Act of 1866. In doing so, Congress exercised its "special competence" by making "findings with respect to the effects of identified past discrimination" and by exercising "its discretionary authority to take appropriate remedial measures." Regents of the University of California v. Bakke, 47 L.Ed.2d 779 n.41 (1978) (Powell, J.). The badges and incidents of slavery found by the 39th Congress were extensive. The legislation it enacted, the Civil Rights Act of 1866, was all-encompassing

with regard to racial discrimination.* Sweeping with the broadest possible brush, the 39th Congress focused not merely on the then-current badges and incidents of slavery but instead sought to legislate equality by outlawing all enumerated forms of racial discrimination.

1. The Language of 42 U.S.C. §1981 Compels the Conclusion that Proof of Scienter Is Not Required

Two aspects of the language chosen for §1981 evidence the absence of any scienter requirement. The first is the simple but significant fact that intent is nowhere mentioned as a prerequisite for a violation of Section 1981. The pertinent portion of Section 1981 provides: "All persons...shall have the same right...to make and enforce contracts...as is enjoyed by white citizens...." This Court has consistently declined to read qualifications or additional requirements into the 1866 Act, and instead has declared "'that if we are to give [the law] the sweep that its origins dictate we must accord it a sweep as broad as its language.'" Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968)

* 42 U.S.C. §1981 thus protects not only blacks but also other minorities and even whites from discrimination. McDonald v. Santa Fe Transportation Co., 427 U.S. 273 (1976).

(brackets in original), quoting United States v. Price, 383 U.S. 787, 801 (1966). Its broad language does not permit the courts "to carve... an exception" where there is none on its face. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968). It is for this reason that this Court has rejected attempts, such as those by defendants here, to alter the plain meaning of its broad language through "'ingenious analytical'" arguments, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968), or through a stilted and "mechanical reading" of that language, McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 287 (1976). And it is for this reason that an intent requirement cannot be judicially grafted onto this facially clear statute which has no such requirement.

Second, the unqualified language of §1981 is less stringent than that of the comparable language of Title VII of the Civil Rights Act of 1964, which this Court has held not to require proof of intentional discrimination. Griggs v. Duke Power Co., 401 U.S. 424 (1971). In Title VII, §703(h), 42 U.S.C. §2000e-2(h), appears to exempt from prohibited discrimination the use of "any professionally developed ability test" that is not "designed, intended or used to discriminate because of race...." Additionally,

§706(g), 42 U.S.C. §2000e-5(g), appears to require as a prerequisite to any court ordered remedies that the employer "has intentionally engaged or is intentionally engaging in an unlawful employment practice." This language, however, does not require a Title VII plaintiff, in order to prove a violation of the statute and to obtain relief, to prove that a challenged test or other practice has been used with an intent to discriminate. For "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). See also, Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 407 (1975).

Section 1981 could not be more clear on its face: there is no intent requirement. And when compared with a statute such as Title VII which employs the words "intended" and "intentionally," but which does not trigger an intent requirement, the totally neutral language of §1981, which simply provides that "[a]ll persons...shall have the same right...to make and enforce contracts ...as is enjoyed by white citizens," cannot be construed to require such a showing.

2. The Legislative History of the Civil Rights Act of 1866 Reinforces the Absence of an Intent to Discriminate Requirement in 42 U.S.C. §1981

The lack of ambiguity in the sweeping language of §1981 obviates an examination of its legislative history. Any such examination, however, reveals that the radical 39th Congress intended its language to be as broad as possible.

Nowhere in the congressional debates leading to the enactment of the Civil Rights Act of 1866 is it hinted that a civil plaintiff seeking to enforce his rights under the Act must prove that the deprivation of his rights resulted from acts of intentional discrimination. Rather, the legislative history conclusively demonstrates that Congress intended to provide practical freedom by outlawing all forms of discrimination against blacks.

As is reviewed in some detail in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 426-444 (1968), nullification of the Black Codes was an important but hardly the only objective of the 1866 Act. The Black Codes of course had to be outlawed. But Congress "also had before it an imposing body of evidence pointing to the mistreatment of Negroes." Jones v. Alfred H. Mayer Co., 392 U.S. at 427 (emphasis in original). This mis-

treatment too had to be outlawed.* Thus, rather than enacting any of the legislative proposals directed solely at the Black Codes, Congress waited for ratification of the Thirteenth Amendment and for Senator Trumbull's broader bill "to protect the freedman in his rights." Cong. Globe, 39th Cong., 1st Sess. at 43. Jones v. Alfred H. Mayer Co., 392 U.S. at 429-431.

Two weeks after ratification of the Thirteenth Amendment, Senator Trumbull, author of the bill which became the Civil Rights Act of 1866, introduced his bill. Cong. Globe, 39th Cong., 1st Sess. at 129. He described its objectives in sweeping terms. It was "intended" to give effect to the Thirteenth Amendment and to "secure for all persons within the United States practical freedom." Cong. Globe, 39th Cong., 1st Sess. at 474 (emphasis added). More expansively, Senator Trumbull sought to insure that practical freedom through a bill which

* As is recounted in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), "one of the most comprehensive studies then before Congress...concluded that, even if anti-Negro legislation were 'repealed in all the States lately in rebellion,' equal treatment for the Negro would not yet be secured." 392 U.S. at 428 (footnote omitted), citing Report of Carl Schurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. at 45.

would "break down all discrimination between black men and white men." Cong. Globe, 39th Cong., 1st Sess. at 599 (emphasis added).

The opponents of Senator Trumbull's bill did not quibble with its language. Rather, they attacked it frontally as providing too much equality. For example, Senator Cowan bitterly opposed the bill because it would eliminate differential treatment "which in any way creates distinctions between black men and white men in so far as their civil rights and immunities extend." Cong. Globe, 39th Cong., 1st Sess. at 603. A bill simply outlawing the Black Codes he might have supported. "But this is not a bill simply for the abolition of slave codes. This is a bill for the abolition of all laws which create distinctions between black men and white ones." Cong. Globe, 39th Cong., 1st Sess. at 603 (emphasis added). In fact, objected Senator Cowan, the bill sought to place blacks and whites "upon precisely the same footing." Cong. Globe, 39th Cong., 1st Sess. at 604 (emphasis added).

Less than a month after Senator Trumbull had introduced his bill, the Senate passed it. Cong. Globe, 39th Cong., 1st Sess. at 606-607. The Senate did so "fully aware of the breadth of the measure it had approved." Jones v. Alfred

H. Mayer Co., 392 U.S. at 433.

The House was no less aware of the intended breadth of this bill. Representative Thayer, a proponent of the bill, spoke of the necessity of effectuating the Thirteenth Amendment's promise of freedom. "It is to give to it practical effect and force.... The practical question now to be decided is whether they shall be in fact freemen." Cong. Globe, 39th Cong., 1st Sess. at 1151 (emphasis added). Representative Cook was equally emphatic. Being free meant the elimination of all barriers and headwinds. This bill thus was necessary, for otherwise any "combination of men in his neighborhood can prevent [a black person] from having any chance to support himself by his labor." Cong. Globe, 39th Cong., 1st Sess. at 1124.

Representatives Cook and Thayer, among other supporters of the bill, were acutely aware that not all forms of discrimination are direct or readily apparent. Some forms of discrimination may have only a discriminatory effect but are equally objectionable. As Representative Lawrence stated, "there are two ways in which a State may undertake to deprive citizens of these absolute, inherent, and inalienable rights; either by prohibitory laws, or by a failure to protect any one of them." Cong. Globe, 39th

Cong., 1st Sess. at 1833. Representative Cook expressed his concern about a similar but more onerous distinction. After making his observation that a number of whites could join together to deny a black person the opportunity to support himself, he commented on the probable further plight of the black person: "They can pass a law [neutral on its face] that a man not supporting himself by labor shall be deemed a vagrant and shall be sold.... Now, are these men free? If a man can be sold as a vagrant because he does not labor, without any inquiry as to whether he can or cannot procure labor, is he a freeman?" Cong. Globe, 39th Cong., 1st Sess. at 1124. Echoing the same concern, Representative Thayer asked rhetorically: "[I]f it is competent for the new-formed Legislatures of the rebel States to enact...laws which impair their ability to make contracts for labor in such a manner as virtually to deprive them of the power of making such contracts...then I demand to know of what practical value is the amendment abolishing slavery in the United States?" Cong. Globe, 39th Cong., 1st Sess. at 1151 (emphasis added).

The answer, of course, was in the bill pending before the House. That bill, according to Representative Cook, would require quite simply that there "be no discrimination" on

grounds of race or color. Cong. Globe, 39th Cong., 1st Sess. at 1124 (emphasis added). When the House passed the bill, it, like the Senate before it, "too believed that it was approving a comprehensive statute forbidding all racial discrimination affecting the basic civil rights enumerated in the Act." Jones v. Alfred H. Mayer Co., 392 U.S. at 435 (emphasis in original).

President Andrew Johnson, believing the bill to be as broad as its language, vetoed the legislation. In his words, the bill attempted to legislate "a perfect equality of the white and black races." Cong. Globe, 39th Cong., 1st Sess. at 1679. Within two weeks, and with virtually no debate, Congress overrode his veto. Cong. Globe, 39th Cong., 1st Sess. at 1809, 1861.

The legislative history of the Civil Rights Act of 1866 is entirely unambiguous. The 39th Congress, which was empowered to prohibit all forms of racial discrimination, whether racially motivated or not, sought to enact antidiscrimination legislation as broad as its §2 powers would allow. It undisputedly thought that it had accomplished that objective in its Civil Rights Act of 1866.

3. There Is No Contemporary Rationale for Imposing a Scierter Requirement on 42 U.S.C. §1981

Even if it were proper for this Court to amend §1981 by engrafting a scierter requirement, there is no contemporary rationale for imposing such a requirement here.

The primary purpose of a scierter concept has been to provide a barrier against the unfair imposition of retrospective legal sanctions upon an unsuspecting defendant. E.g., Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). Since the plaintiffs herein seek solely prospective equitable relief and since the defendants were on clear notice that their employment practices raised serious issues of racial fairness, no necessity for a scierter requirement as a barrier to unfair retrospective legal sanctions exists in this case.

A secondary purpose of a scierter concept is to insure that governmental officials will not be over-deterred from performing legitimate functions by a fear of strict liability. E.g., Wood v. Strickland, 420 U.S. 308 (1975). Since the defendants herein are engaged in employment practices which perpetuate racial exclusion while failing to improve the quality of the workforce, no necessity for a scierter requirement as a

brake on over-deterrence of legitimate activity exists.

Given (a) the prospective equitable nature of the relief sought; (b) the defendants' knowledge of probable illegality; (c) the racially exclusionary nature of the practices at issue; and (d) the failure of the practices at issue to improve job performance, no substantial social policies would be served by imposing a scienter obligation on plaintiffs challenging racially exclusionary public employment practices under 42 U.S.C. §1981.

Moreover, viewed from the perspective of a minority applicant for employment, it matters not at all whether the irrational* hurdle which bars his path was constructed maliciously, recklessly, negligently or inadvertently, since the net result is identical--the exclusion of racial minorities from employment by means of tests or devices which screen out minorities without materially aiding in the establishment or maintenance of an effective civil service.

* The employment practices which are the subject of this litigation are irrational because they screen out racial minorities without improving the quality of the work force. If the practices were rational, i.e., predictive of employment performance, no violation of §1981 can occur despite the practices' disproportionate racial impact.

Of course, where the issue is not the grant of prospective relief but rather the imposition of retrospective sanctions, the mental culpability of a defendant may assume greater importance. E.g., Wood v. Strickland, supra. However, where, as here, minority plaintiffs seek prospective relief against defendants who were on notice of the possible illegality of their actions and who cannot demonstrate that the practices at issue are predictive of job performance, the case for a scienter requirement is at its lowest ebb. See generally, SEC v. World Radio Mission, Inc., 544 F.2d 536 (1st Cir. 1976) [scienter not required for 10(b)(5) prospective injunction].

B. Assuming Arguendo that 42 U.S.C. §1981 Requires Proof of Scienter, Plaintiffs Have Overwhelmingly Established Scienter as a Matter of Law.

Even if the Court engrafts a scienter requirement onto 42 U.S.C. §1981, any requisite showing of scienter has been conclusively established by plaintiffs in this case. It must be emphasized that plaintiffs were "not requir[ed]...to prove that the challenged action rested solely on racially discriminatory purposes," but only "that a discriminatory purpose has been a motivating factor in the decision." Arlington Heights v. Metro. Housing Development Corp., 429 U.S. 252, 265-266 (1977) (emphasis added); see also, Washington v. Davis, 426 U.S. 229 (1976).

The trial court, however, believing the issue of scienter to be irrelevant under Section 1981, nevertheless made a gratuitous finding that defendants did not act with the "willful or conscious prupose" of excluding blacks and Chicanos from public employment. Finding of Fact Number 7 in 8 FEP Cases 239, 241 (1973). In making this finding, the trial court erred as a matter of law by not defining the culpable mental state applicable to defendants. The trial court also erred in placing the burden of

persuasion on the scienter issue on plaintiffs. This Court's decisions establish that once a plaintiff produces evidence which indicates that it is more probable than not that a defendant has acted with improper racially discriminatory purpose, the burden of producing evidence to rebut that prima facie showing as well as the burden of persuasion on the issue of scienter shifts to the defendant. To the extent that scienter is added by this Court to §1981, the trial court's errors on culpable mental state and burdens of proof, discussed hereafter in sections B.2. and B.3., must be reversed as a matter of law.

However, even assuming arguendo that plaintiffs were legally required to prove the highest state of mental culpability and that plaintiffs had not only the production burden but also the persuasion burden, plaintiffs' proof was sufficiently overwhelming for this Court to find the trial court's Finding of Fact Number 7 "clearly erroneous." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). As is set forth hereafter, plaintiffs unquestionably proved that a discriminatory purpose was a motivating factor in defendants' employment practices.

1. Plaintiffs Established a Racially Discriminatory Purpose as a Matter of Law.

As noted above, plaintiffs only were required to prove that a racially discriminatory purpose had been a motivating factor in defendants' hiring practices. As Justice Powell stated for the Court in Arlington Heights:

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. Fruitful subjects for such circumstantial and direct evidence are not a matter of speculation, as Justice Powell, "without purporting to be exhaustive," specifically described a number of "subjects of proper inquiry in determining whether racially discriminatory intent existed." 429 U.S. at 266-268.

Three of the "subjects of proper inquiry" set forth in Arlington Heights are particularly relevant to defendants' conduct in this case:

(a) The discriminatory intent of defendants' hiring practices is "unexplainable on grounds other than race," 429 U.S. at 266;

(b) The "historical background" of defendants' hiring practices evidences defendants' discriminatory purpose, 429 U.S. at 267; and

(c) The defendants' "departures from the normal procedural sequence" further reveals defendants' "improper purposes." 429 U.S. at 267.

The evidence in the record is more than sufficient to resolve this inquiry in plaintiffs' favor as a matter of law.

- a. The Racial Imbalance of Defendants' Workforce, and the Discriminatory Impact of the 1972 Written Test Are Unexplainable on Grounds Other than Race

In Washington v. Davis, 426 U.S. 229 (1976), this Court made clear that although statistics in some instances may not be enough to prove discriminatory purpose, the use of statistics showing racial imbalance or racial impact is "not irrelevant." 426 U.S. at 241. Rather, a "discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." 426 U.S. at 242. Far from irrelevant, racial statistics sometimes illuminate a "clear pattern" of discrimination, "unexplainable on grounds other than race." Arlington Heights v. Metro. Housing Development Corp., 429 U.S. 252, 266 (1977).

In the area of employment discrimination, workforce statistics are of primary importance in revealing improper discriminatory purpose. As this Court explained in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977):

"Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful

discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." 431 U.S. at 339-340 n.20 (emphasis added).

In this case, the racial and ethnic composition of defendants' workforce is wholly unrepresentative of the racial and ethnic population of the community.* As the court of appeals below summarized:

* Defendants have argued that population statistics are not the best statistics for comparative purposes. Defendants' argument is flawed for two reasons. First, the "argument fails in this case" even more resoundingly than it did in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339-340 n.20 (1977), because §1981, unlike Title VII, does not contain a statutory clause militating against workforce-population comparisons. Yet, even in Teamsters, this Court stated:

"Evidence of long standing and gross disparity between the composition of a work force and that of the general population thus may be significant even though §703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population." 431 U.S. 324, 339-340 n.20 (1977).

Second, use of population statistics for workforce comparability is as proper here as it was in Teamsters where the jobs at issue were entry-level jobs requiring no special qualifications. Cf., Hazelwood School District v. United States, 433 U.S. 299 (1977).

"Despite a minority population of approximately 29.1% in Los Angeles County, only 3.3% of the firemen employed by the defendants at the time of trial were black or Mexican-American." 566 F.2d at 1337.

Stated otherwise, although approximately 10.8% of the general population of Los Angeles County is black, only 9 persons in defendants' workforce of 1,762, or .5%, were blacks. (R.136) And although 18.3% of the general population of Los Angeles County is Mexican-American, only 50 persons in defendants' workforce, or 2.8%, were Mexican-Americans. (R.136) In a county with a very sizeable and growing minority population, 96.7% of the defendants' jobs had been given to whites. This considerable racial imbalance is not merely a telltale sign of purposeful discrimination. It is entirely unexplainable on grounds other than race.

The second set of statistics of particular relevance is the racial impact of the challenged practice. "It is also not infrequently true that the discriminatory impact...may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." Washington v. Davis, 426 U.S. 229, 242 (1976).

The discriminatory impact of the defendants'

1972 and 1969 written tests was considerable. As summarized by the court of appeals, in 1972, "while 25.8% of the white applicants were among the top 544 scorers on the test, only 5.1% of the black applicants were included in that group." 556 F.2d at 1337. The 1969 test results were equally startling. "Of the 244 blacks who took the 1969 examination, 5 were hired; of the 100 Mexican-Americans, 7 were hired, while of the 1080 whites taking the test, 175 were hired. Thus, while approximately 25% of the 1969 applicants were black or Mexican-American, based on the results of this test, only 6.4% of the hires were minorities." 556 F.2d at 1337. Coupled with the defendants' severely unbalanced workforce, defendants' use of written tests with such a racially disparate impact is difficult to explain on nonracial grounds.

b. The Historical Background of Defendants' Hiring Practices Also Reveals Discriminatory Purpose

Plaintiffs below did not rely solely on the foregoing statistics. They also provided evidence of the "historical background" of defendants' practices which "reveal[ed] a series of official actions taken for invidious purposes." Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at 267.

Not only did defendants' written tests have a severe racially discriminatory impact, defendants knew that the tests were discriminatory and could not be shown to be job related. (Pl.Ex.8) As the evidence at trial revealed, high officials in defendants' personnel department knew that the written tests operated with a discriminatory impact to exclude blacks and Mexican-Americans from firefighter positions. (Pl.Exs.7,8,9; T.R. 48-49) Moreover, defendants "conceded that no studies establishing the validity of the written employment tests have been conducted in accordance with 'professionally acceptable methods.'" 566 F.2d at 1337 n.5. But despite these admissions, defendants knowingly and willfully continued to use their discriminatory tests until they learned that plaintiffs' lawsuit was about to be filed.

Defendants' use of this discriminatory written test was not the only selection criterion used to discriminate. Defendants also required applicants to meet a 5'7" height requirement. Aware that this requirement had a severely discriminatory impact, defendants "stipulated that 41% of the otherwise eligible Mexican-American applicants are excluded by the requirement." 556 F.2d at 1341 (footnote omitted). Again, defendants offered no validity studies. Instead, Fire Chief Stanley E. Barlow, who stood only

5'8" tall, "conceded that in the past firemen under 5'7" have been able to function without impairment due to their height." 556 F.2d at 1342. Despite these admissions, and despite the clear illegality of their use of this discriminatory height requirement, Dothard v. Rawlinson, 433 U.S. 321 (1977), defendants knowingly and willfully continued their discriminatory practice.

Given this historical background, it is not surprising that the Los Angeles County Fire Department was known in the minority community as a racially discriminatory employer. (T.R. 52,134) Defendants, however, took no steps to dispel their apparently well-earned discriminatory reputation. (T.R. 194)

c. Defendants' Departure from Normal Procedures Further Proves Improper Discriminatory Purpose

Also probative of improper motives are "[d]epartures from the normal procedural sequence." Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at 267. Proof here is not limited only to procedural departures. "Substantive departures too may be relevant." 429 U.S. at 267. Although evidence of procedural or substantive departures ordinarily is difficult to discover, three significant departures by defendants were proven here by plaintiffs.

Loss of 300 applications--Normally, an employer's discriminatory practices, especially a practice such as a discriminatory height requirement, will have an adverse impact on minority applicant flow "since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory." Cf., Dothard v. Rawlinson, 433 U.S. 321, 330 (1977). This undoubtedly was the situation here. Yet, minorities continued to apply. Apparently defendants were concerned that too many minorities had applied or sought to apply. At one stage, defendants inexplicably "lost" the names of 300 minorities who sought applications. (T.R.122-145, 188)

Discrimination in applicant assistance programs--In the normal course of events, defendants conducted programs designed to assist applicants to compete for employment. However, according to the testimony of Harold McCann, a captain in the Los Angeles County Fire Department, these programs were conducted exclusively for whites, while similar programs for minority participants were prohibited by the Fire Department. (T.R.91-113)

Sudden hiring of numerous minority applicants--The third and most telling departure

from past practices occurred after defendants learned that they were about to be sued by plaintiffs. Defendants' normal hiring practices had virtually excluded blacks and Mexican-Americans from employment. But, upon learning about the instant lawsuit, defendants backpedaled furiously. After this lawsuit was filed, defendants demonstrated the depth of their past discrimination by easily hiring minorities above their representation in the population. (R.140-141; T.R.48-49) Although defendants' efforts to redress the effects of their past discrimination are commendable, they underscore the discriminatory purposes which infected defendants' prior hiring practices.

Even if plaintiffs bear the burden of persuasion on the issue of scienter, the above-described facts conclusively establish that improper racially discriminatory purposes infected defendants' hiring practices. Although defendants testified that the exclusion of minorities from the Fire Department was not purposeful, the undisputed facts in the record make it impossible for a fact finder to determine that defendants' hiring practices were not in part motivated by racially discriminatory purposes. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at 265-266.

2. Plaintiffs Established a Sufficiently Culpable Mental State to Justify Liability and Prospective Relief.

Although Amici submit that plaintiffs here proved as a matter of law "that a discriminatory purpose has been a motivating factor" in defendants' use of discriminatory employment practices, Arlington Heights v. Metro. Housing Development Corp., 429 U.S. 252, 265-266 (1977) (emphasis added), plaintiffs need not have proved as much as they did.

In Arlington Heights and in Washington v. Davis, 426 U.S. 229 (1976), this Court ruled that some degree of mental culpability must be found to establish a violation of the Equal Protection Clause. However, in identifying a subjective mental condition as an element of a Fourteenth Amendment violation, this Court took merely the first step in the process of defining precisely the nature of the mental state which will trigger such a violation. The Court in Washington discussed only two possible mental states: malicious guilt and complete innocence. While such a bi-polar analysis may be helpful in deciding whether scienter is required at all to establish a constitutional violation, it is too simplistic to serve as a guide for determining

the precise mental state necessary to give rise to such a violation. Additionally, as we have pointed out in section A.3, supra, whatever the proper guide may be for constitutional liability, that guide is not necessarily appropriate for employment defendants under 42 U.S.C. §1981. Since §1981 has never had a scienter requirement imposed upon it, the nature of such a requirement remains an open question if in fact scienter is engrafted.

Since mental states do not neatly divide into the extremes of the bi-polar model, it is necessary to identify intermediate or equivalent mental states which encompass neither malicious guilt or complete innocence. Thus, in mapping the contours of the good faith defense available to government officials sued for retrospective damages, this Court has been careful to identify a mental state consistent with recklessness or negligence, and to predicate liability upon it. E.g., Wood v. Strickland, 420 U.S. 308 (1975). Similarly, courts in the wake of Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), have explored whether a mental state consistent with negligence may form the basis for prospective equitable relief even when negligence alone has been found insufficient for an award of retrospective damages. E.g., SEC v. Universal Major Industries Corp.,

546 F.2d 1044 (2d Cir. 1976); SEC v. World Radio Mission, 544 F.2d 535 (1st Cir. 1976). Indeed, Ernst & Ernst v. Hochfelder, supra, itself reserved the question of whether a state of mind consistent with recklessness would give rise to a 10(b)(5) action for retrospective damages. 425 U.S. at 194 n.12. Similarly, the extent to which mental states consistent with recklessness and negligence provide sufficient culpability to warrant a conviction of varying degrees of homicide have been the subject of intense study. E.g., Perkins, The Criminal Law 61 (1957); Michael and Wechsler, A Rationale of the Law of Homicide, 37 Col.L.Rev. 701 (1937); Wechsler, Codification of the Criminal Law in the United States: The Model Penal Code, 68 Col.L.Rev. 1425 (1968).

Finally, the law of torts has systematically explored mental states lying on a continuum from willful intent to total inadvertence in an attempt to determine the requisite mental condition upon which to predicate liability. In fact, the negligence standards of tort liability in some instances have been adopted in whole as applicable to determining liability under 42 U.S.C. §1983. Thus, in Monroe v. Pape, 365 U.S. 167 (1961), the Court rejected a standard under 42 U.S.C. §1983 requiring proof of "the doing of an act with 'a specific intent to

deprive a person of a federal right,'" because the word "'willfully' does not appear in [§1983]" and because §1983 is not a "criminal law" but rather only "provides a civil remedy." 365 U.S. at 187. Accordingly, §1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. at 187.*

Just as courts have been compelled to identify and determine the legal consequences of intermediate or equivalent mental states in areas of the law as divergent as tort liability, securities regulation, and homicide, so must this Court confront the foreseeable consequences test and the intermediate or equivalent mental states such as recklessness, negligence, gross disregard

* This foreseeable consequences test has been widely applied in school desegregation cases. Most recently, Judge Wisdom, writing for the court in United States v. Texas Educational Agency, 564 F.2d 162 (5th Cir. 1977), held that "discriminatory intent may be inferred from...acts that had foreseeable discriminatory consequences." 564 F.2d at 168; see generally, 564 F.2d at 165-170. For other applications of the foreseeable consequences test, see, United States v. School District of Omaha, 521 F.2d 530, 535-536 (8th Cir.), cert. denied, 423 U.S. 946 (1975); Morgan v. Kerrigan, 509 F.2d 580, 588 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975); Oliver v. Michigan State Board of Education, 508 F.2d 178, 181-182 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975); Bradley v. Milliken, 484 F.2d 215, 222 (6th Cir. 1973), aff'd in relevant part, 418 U.S. 717, 738 n.18 (1974).

and deliberate indifference in the context of §1981, assuming this Court imposes a scienter requirement on §1981. Given the facts of this case, no reasonable finder of fact could fail to find that defendants, at best, not only foresaw the consequences of their acts but also acted with recklessness, deliberate indifference of, and gross disregard for the discriminatory effects of their non job related practices on racial minorities. Such a culpable mental state is more than sufficient to found prospective relief.

Amici submit that defendants' negligence in gratuitously inflicting harm on minority applicants should constitute a sufficiently culpable mental state to found prospective liability under §1981. Where, as here, defendants' culpability far exceeds negligence, constituting instead reckless disregard and deliberate indifference, the district court was authorized and, indeed, obligated to enter effective prospective relief disestablishing racially exclusionary hiring practices.

3. The District Court Erred in Allocating the Burden of Proof on the Issue of Scienter.

Amici have argued in Point A, supra, that the legislative history and Thirteenth Amendment ancestry of 42 U.S.C. §1981 render it extremely unlikely that Congress intended to burden freedmen seeking prospective relief against racially exclusionary employment practices with a scienter requirement. However, if this Court determines that the district court lacked power to issue prospective relief in the absence of some degree of mental culpability, this Court must begin the task of defining and allocating the burdens of proof* on the issue of scienter.** In criminal cases, the Due Process Clause governs the allocation and size of the persuasion burden, leaving to the courts substantial latitude in allocating the production burden. E.g., Davis v. United States, 160 U.S. 469 (1895) (production burden on insanity on defendant; persuasion

* Amici use the term "burdens of proof" to include the burden of production and the burden of persuasion. See generally, J. Thayer, A Preliminary Treatise on Evidence at the Common Law, 355-59 (1898); James, Burdens of Proof, 49 Va.L.Rev. 51 (1961).

** Amici have discussed the precise nature of the culpable mental states necessary to establish a §1981 violation in sections B.1. and B.2., supra.

burden on prosecution). See generally, In re Winship, 397 U.S. 358 (1969); Mullaney v. Wilbur, 421 U.S. 624 (1975); Patterson v. New York, 432 U.S. 197 (1977). In many civil contexts, the legislature has directed a given allocation of the production and persuasion burdens. In most cases, however, the courts retain substantial latitude in choosing the size and allocation of both production and persuasion burdens. E.g., James, Burdens of Proof, 47 Va.L.Rev. 51 (1961); Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan.L.Rev. 5 (1959). Although the court below did not explicitly allocate burdens of proof, it appeared to assume that both the production and persuasion burdens on the scienter issue rested with the plaintiffs. Such an assumption was erroneous.*

Modern analysis reveals that the allocation and size of the burdens of proof in a civil case are governed by two factors: (1) relative ease of access to the evidence; and (2) the degree of error displacement which the legal system wishes to impose on a given fact-finding process. See,

* As Amici have shown in section B.1, supra, even under such an erroneous view of the burdens of proof, plaintiffs established discriminatory purpose as a matter of law.

e.g., Underwood, The Thumb on the Scale of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L.J. 1299 (1977); McBaine, Burden of Proof: Degrees of Belief, 32 Cal.L.Rev. 242 (1944). Whether one approaches the issue of proof of scienter in an employment discrimination case from the perspective of relative ease of access to the evidence or from the perspective of displacement of error, the burdens of proof should, in large part, be borne by the defendant.

First, as this Court noted in Arlington Heights v. Metro. Housing Development Corp., supra, proof of purposeful racial animus is a difficult task. The subjective motivation of actors in our legal system has consistently proven an elusive and baffling quarry. Cf., Screws v. United States, 325 U.S. 91 (1945). Moreover, the difficulty of establishing a state of mind is exacerbated when the particular mental state is morally repugnant. Put bluntly, subjective bigotry is uniquely difficult to prove precisely because bigots are not encouraged to advertise their true feelings and, indeed, may not even consciously recognize the racially tinged roots of their behavior. If, however, this Court directs the lower courts to embark upon a search for such an elusive subjective phenomenon, no doubt exists that defendants

enjoy far greater access to the relevant proof than do plaintiffs. Proof concerning the existence of neutral justifications for racially exclusionary employment practices will rarely, if ever, be available to a plaintiff, but will be routinely available to a defendant.

Second, it is, of course, a truism to note that to the extent our legal system errs in the area of racially unfair hiring practices, it should err on the side of their prospective disestablishment of unfair practices. Thus, if error is to be displaced, it should be displaced in favor of ending racially exclusionary hiring practices which do not materially contribute to the efficiency of the work force. Traditionally, our legal system has effected such a displacement of error by carefully allocating and defining the burden of persuasion. See generally, Underwood, The Thumb on the Scale of Justice, *supra*; Morse, Evidentiary Lexicology, 59 Dick.L.Rev. 86 (1954); *cf.*, Patterson v. New York, 432 U.S. 197 (1977); Castaneda v. Partida, 430 U.S. 482 (1977); In re Winship, 397 U.S. 358 (1969).

Given the powerful arguments in favor of imposing both burdens of proof on the scienter issue on a §1981 defendant, it would be reasonable to require a §1981 defendant to bear both the production and persuasion burdens. However,

Amici believe that the purposes of §1981 may be served by the less dramatic allocation suggested by this Court in Castaneda v. Partida, 430 U.S. 482 (1977). Under such an allocation, §1981 plaintiffs would bear the production burden on the issue of scienter. Once such a production burden were satisfied, however, the persuasion burden would be borne by the defendant.*

a. The Nature of Plaintiffs' Production Burden

Orthodox evidentiary analysis defines a production burden as the obligation to produce evidence from which a reasonable finder of fact may determine that the contested fact (scienter) is more likely than not to exist.** Where, as

* A similar judge-made bifurcation of the production and persuasion burdens exists in most jurisdictions with respect to the insanity defense. Criminal defendants bear a production burden on the issue of sanity. However, once such a production burden is met, the state bears the persuasion burden. *E.g.*, Davis v. United States, 160 U.S. 469 (1895).

** Recent analysis has argued that the production burden is not a fixed quantum of evidence, but rather varies as a function of the persuasion burden. McNaughten, Burden of Production of Evidence: A Function of a Burden of Persuasion, 68 Harv.L.Rev. 1382 (1955). *See* United States v. Taylor, 464 F.2d 240 (2d Cir. 1972); United States v. Melillo, 275 F.Supp. 314 (E.D.N.Y. 1967). However correct such an approach may be as a matter of pure logic, Amici have described the production burden as a fixed concept, first, because substantial persuasion burden consequences turn on its satisfaction. Since the allocation of the persuasion burden to the defendant is triggered by satisfaction of the production burden, Amici deem it appropriate to adopt the concept of a fixed production burden. United States v. Feinberg, 140 F.2d 592 (2d Cir. 1944) (per Learned Hand).

here, plaintiffs have demonstrated, first, that defendants' employment practices acted to exclude blacks and Chicanos from the work force and, second, that the practices were not materially effective in establishing or maintaining an efficient work force, an inference of scienter may be drawn by a reasonable finder-of-fact. Washington v. Davis, 426 U.S. at 253 (Stevens, J., concurring opinion). See, United States v. Texas Educ. Agency, 564 F.2d 162, 165-170 (5th Cir. 1977) (defendants in a school desegregation case are presumed to intend the natural consequences of their acts, citing Monroe v. Pape, supra. Accordingly, plaintiffs have clearly satisfied their production burden.* Castaneda v. Partida, 430 U.S. 482 (1977).

b. The Nature of the Defendants' Persuasion Burden

The persuasion burden instructs the finder of fact as to the proper disposition of doubtful cases. Where, as here, a plaintiff seeking prospective relief has come forward with evidence from which a reasonable finder of fact may infer purposeful racial discrimination, doubts should be resolved in favor of the plaintiff. Such a

* Not only have plaintiffs satisfied a production burden, they have produced sufficient evidence of racially discriminatory purpose to satisfy a persuasion burden as well. See, section B.1., supra.

resolution maximizes the prospective disestablishment of racially unfair practices, without saddling a defendant with retrospective liability. Thus, Amici suggest, a finder-of-fact should be instructed to find for a plaintiff in a §1981 action seeking prospective relief unless the defendants persuade the finder of fact that it is more likely than not that scienter did not exist.*

c. Castaneda v. Partida is an Example of the Proper Allocation of Burdens of Proof

In Castaneda v. Partida, supra, a habeas corpus petitioner challenged the constitutionality of the Grand Jury selection process in Hildago County, Texas, alleging that Mexican-Americans were substantially underrepresented on the panels. As the decisions of this Court made clear, in order to prevail, the petitioner was obliged to demonstrate the intentional exclusion of racial minorities from the Grand Jury process. Thus, the issue of scienter was squarely posed.

* As noted in section B.1., infra, defendants' evidence is inadequate to meet the slightest of burdens of persuasion and, in fact, is wholly insufficient to rebut plaintiffs' showing of purposeful discrimination, even if plaintiffs are found to have the burden of persuasion on the issue of scienter.

In support of his contention, the petitioner in Castaneda produced statistical evidence demonstrating that while Hidalgo County was 79 percent Mexican-American, minority representation on Grand Jury panels approximated only 40 percent. This Court found that such evidence of disproportionate racial impact satisfied petitioners' production burden on the issue of scienter.

Respondents in Castaneda produced virtually no evidence tending to rebut the inference of scienter which flowed from petitioner's statistics. Under such circumstances, this Court reversed a finding of fact by the trial court that scienter did not exist. Although this Court did not explicitly describe its allocation of the persuasion burden in Castaneda, its action in reversing the district court's finding of fact reveals that the persuasion burden was allocated to the respondent. If the persuasion burden were deemed to rest with petitioner in Castaneda, this court's reversal could be explained only by a finding that, based on petitioner's statistics, no reasonable finder of fact could fail to find that it was more probable than not that scienter existed. While such a reading of Castaneda is possible, it is a highly strained one. If, however, the persuasion burden is deemed to rest with the respondents in Castaneda,

this Court's reversal is explained by a finding that, given respondents' total failure to present rebuttal evidence, no reasonable finder of fact could find that it was more probable than not that scienter did not exist.

d. Defendants Failed, as a Matter of Law, To Satisfy a Persuasion Burden on the Issue of Scienter

Under an appropriately allocated persuasion burden, defendants must establish that it is more likely than not that no culpable mental state existed. Unlike the defendants in Washington v. Davis, supra, the defendants herein have come forward with no evidence tending to negate the existence of a culpable mental state. 426 U.S. at 235, 246.

In Washington, the defendants first countered the discriminatory effect of their test by proving that it was "directly related to the requirement of the police training program and that [there was] a positive relationship between the test and training course performance." 426 U.S. at 250. More importantly, however, the Washington defendants had for years "systematically and affirmatively sought to enroll black officers." 426 U.S. at 235. These efforts had produced a 44% black work force, a workforce representation which was "roughly

equivalent" to black population in defendants' recruitment area. 426 U.S. at 235. These efforts also produced years of new recruit classes which also were 44% black. 426 U.S. at 235.

The record in the instant case could not be more dissimilar from that in Washington. First, defendants here "conceded that no studies establishing the validity of the written employment tests have been conducted in accordance with 'professionally acceptable methods.'" 566 F.2d at 1337 n.5. Since there were no studies correlating the test's relationship with job performance or with training performance, the court of appeals below quite properly noted that "defendants' proof not only is insufficient under Griggs, but also falls far short of the quality and quantity of proof offered in Washington." 566 F.2d at 1341 n.13. Moreover, defendants here had not undertaken systematic affirmative efforts to enroll minority firefighters, as was the case in Washington, 426 U.S. at 235. Instead, their discriminatory practices resulted in only a trickle of black and Mexican-American employees, and produced a workforce of only 3.3% black and Mexican-American firefighters at the time of trial. 566 F.2d at 1337.

The absence of any good faith efforts by defendants here is further illustrated by the historical background of defendants' practices (including their knowing use of their discriminatory and unvalidated written test, and their knowing use of their discriminatory and unvalidated 5'7" height requirement), as well as by their departures from normal procedures (including their loss of the names of 300 minority applicants and their prohibition against conducting application programs which included minority applicants while conducting such programs for whites). While a smoking gun, of course, is unnecessary, plaintiffs' evidence at trial was so strong that Fire Chief Barlow himself admitted that defendants had engaged in intentional discrimination. (R.T.187-188)

The evidence of purposeful discrimination is so strong in this case that plaintiffs' proof is sufficient to carry a burden of persuasion on the issue of scienter. Given the allocation of the burden of persuasion suggested by Amici and by this Court's decision in Castaneda, however, it seems beyond question that no reasonable finder of fact on this record could find that the requisite scienter did not exist.

Accordingly, Amici urge this Court to follow its practice in Castaneda and to reverse the

district court's Finding of Fact on the scienter issue. At a minimum, however, the issue should be remanded for fresh findings of fact under an appropriately allocated burden of persuasion and with guidance as to the mental states under which prospective relief can be granted under §1981.

C. The Affirmative Hiring Order Imposed To Remedy Defendants' Past Discrimination Is Constitutionally Permissible If Not Constitutionally Required . . . . .	.53

More than a decade ago, speaking of the remedial powers of the federal courts, this Court stated that a "court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965) (emphasis added). Where past discrimination is found, a district court's "task is to correct, by a balancing of the individual and collective interests, the condition that offends" the law. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971) (emphasis added).

Nowhere have these maxims, requiring affirmative relief to overcome the effects of past discrimination, been more applicable and more widely applied than in employment discrimination litigation. See, e.g., Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). In innumerable instances, the affirmative relief required or approved by the federal courts has encompassed numerical hiring ratios and goals to overcome the effects of past discrimination. See, e.g., Bridgeport Guardians v. Bridgeport Civil Service Commission, 482 F.2d 1333 (2d Cir.

1973) (where the affirmative relief imposed under 42 U.S.C. §1981 and §1983 established an ultimate goal, required future minority applicants to be placed in a separate minority pool, required 50% of the next ten vacancies to be filled from the minority pool, required 75% of the next twenty vacancies to be filled from the minority pool, and required 50% of the vacancies thereafter to be filled from the minority pool until the goal was reached), and Carter v. Gallagher, 452 F.2d 327 (8th Cir.) (en banc), cert. denied, 406 U.S. 950 (1972) (where the affirmative relief imposed under §1981 established a goal and required 33% of the future hires to be minority until the goal was attained), both of which were cited with approval by Mr. Justice Powell in his separate opinion in Regents of the University of California v. Bakke, 57 L.Ed.2d 750, 778 (1978) (Powell, J.). See also, the cases cited by Mr. Justice Brennan, writing for himself and for Justices White, Marshall, and Blackmun, 57 L.Ed.2d at 811 n.28 (Brennan, J.).*

* The courts of appeals in nine circuits have ordered or approved race conscious numerical measures to remedy past discrimination or minority underutilization in employment.

FIRST CIRCUIT: Associated General Contractors of Mass., Inc. v. Altschuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974); Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), cert. denied,

The judicial imposition of ratios and goals in order to remedy past discrimination was specifically approved by five members of this Court in Regents of the University of California v. Bakke, supra. In Bakke, Mr. Justice Powell unequivocally affirmed that after findings of discrimination have been made, "the governmental interest in preferring members of the injured groups at the expense of others is substantial." 57 L.Ed.2d at 782 (Powell, J.). He continued:

"In such a case, the extent of the injury and the consequent remedy will have been judicially...defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least

421 U.S. 910 (1975);

SECOND CIRCUIT: Rios v. Enterprise Association Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 482 F.2d 1333 (2d Cir. 1973); United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939 (1973);

THIRD CIRCUIT: Erie Human Relations Commission v. Tullio, 493 F.2d 371 (3d Cir. 1974); Contractors Association v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971);

FOURTH CIRCUIT: Sherrill v. J.P. Stevens & Co., 551 F.2d 308 (4th Cir. 1977);

FIFTH CIRCUIT: NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974) (en banc), cert. denied, 419 U.S. 895 (1974); Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969);

SIXTH CIRCUIT: EEOC v. Detroit Edison Co., 515 F.2d 301, 317 (6th Cir. 1975), vac'd and rem'd on other grounds, 431 U.S. 951 (1977); United States v. Masonry Contractors Association, 497 F.2d 871, 877 (6th Cir. 1974); United

possible harm to other innocent persons competing for the benefit." 57 L.Ed.2d at 782 (Powell, J.).

Mr. Justice Powell also, of course, cited with approval not only Bridgeport and Carter, where judicially imposed numerical ratios and goals had been premised upon findings of past discrimination; but also cases such as Contractors Association of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971), and Associated General Contractors of Massachusetts, Inc. v. Altschuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974), where administratively imposed numerical ratios and goals had been premised not upon findings of past discrimination but only upon

States v. Local 212, IBEW, 472 F.2d 634, 636 (6th Cir. 1973); Sims v. Local 65, Sheet Metal Workers, 489 F.2d 1023, 1037 (6th Cir. 1973); United States v. Local 38, IBEW, 428 F.2d 144, 149 (6th Cir.), cert. denied, 400 U.S. 943 (1970);

SEVENTH CIRCUIT: United States v. Chicago, 549 F.2d 415 (7th Cir. 1977), cert. denied, 434 U.S. 875 (1978); Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); Southern Illinois Builders Association v. Ogilvie, 471 F.2d 680 (7th Cir. 1972);

EIGHTH CIRCUIT: United States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); Carter v. Gallagher, 452 F.2d 327 (8th Cir.) (en banc), cert. denied, 406 U.S. 950 (1972);

NINTH CIRCUIT: United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971).

determinations of minority underutilization. 57 L.Ed.2d at 778 (Powell, J.).*

* To be sure, there has been extensive past discrimination in the building trades. But the constitutionality of executive order affirmative action requirements has been premised not upon findings of past discrimination but rather upon determinations of minority underrepresentation. In Contractors Association of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971), the court held that statistical evidence "revealing the percentages of utilization of minority group tradesmen in the six trades compared with the availability of such tradesmen in the five-county area, justified the issuance of the order without regard to a finding as to the cause of the situation.... A finding as to the historical reason for the exclusion of available tradesmen from the labor pool is not essential for federal contractual remedial action." 442 F.2d at 177. A similar decision was reached in Associated General Contractors of Massachusetts, Inc. v. Altschuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974), where the court upheld the constitutionality of a numerical hiring order which had been imposed under a state executive order designed not to remedy past discrimination but only to redress minority underrepresentation. 490 F.2d at 13, 14, & 19. Gratuitously, if not as an afterthought, the court of appeals observed "that past racial discrimination in Boston's construction trades is in large part responsible for the present racial imbalance." 490 F.2d at 21.

Similar decisions have upheld the constitutionality of the 10% set aside for minority business enterprises in §103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2), despite the fact that the 10% set aside was premised not on findings of past discrimination but only upon statistical evidence of minority enterprise underrepresentation. For example, in the first post-Bakke decision on the 10% set aside, the Court of Appeals for the Second Circuit upheld the 10% set aside as constitutional while observing that "the absence of such a finding

Mr. Justice Brennan, writing for himself and for Justices White, Marshall and Blackmun, presented an even more expansive view of the constitutional appropriateness of race conscious preferential remedies. In his view, not only may such remedies be imposed on government employers by the courts but governments voluntarily "may adopt race conscious programs designed to overcome substantial, chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination." 57 L.Ed.2d at 819 (footnote omitted) (Brennan, J.). The past discrimination being remedied need not be that of a specifically identified employer; rather, the past discrimination may be "its own or that of society's at large." 57 L.Ed.2d at 820-821 (Brennan, J.).

Where the past discrimination being remedied is not that of society at large but rather that of a specific employer judicially determined to have engaged in discriminatory practices, judicially imposed numerical relief is not only constitutionally permissible but also equitably necessary. As the Fifth Circuit recently observed, in a post-Bakke decision approving its pre-Bakke

[of past discrimination] in the [legislative history] is not determinative. Fullilove v. Kreps, ___ F.2d ___, ___ (2d Cir., Sept. 22, 1978) (No. 78-6011, Slip Op. at 4830).

imposition of numerical hiring relief: "The Bakke decision should not be viewed as a contrary decision of law applicable to the issue of the constitutionality of affirmative hiring relief, but as a decision reaffirming the equitable power of federal courts to remedy the effects of unconstitutional acts through race-conscious means." Morrow v. Dillard, ___ F.2d ___, ___, 47 U.S.L.W. 2233, 2234 (5th Cir., Sept. 29, 1978) (approving affirmative relief which required the employer to offer appointment first to every black applicant who met the minimal qualifications necessary for employment).

The judicially imposed numerical relief at issue in the instant case, of course, was not intended to remedy the past discrimination of society at large. Rather, the community-representation goal and the 1:1:3 hiring ratio (1 black and 1 Mexican-American to be hired for every three whites hired)* were imposed to remedy the government employer's own longstanding

* There of course is no issue in this case about whether affirmative relief should extend to unqualified members of the victimized group. The court of appeals below emphasized that "while it should be obvious to all, we nevertheless repeat the admonition that nothing said by this Court is to be taken as a requirement that the defendants hire any unqualified applicant for the performance of these essential jobs." 566 F.2d at 1344.

discrimination. In view of defendants' past practices, this affirmative relief may be inadequate. It certainly is less far reaching than the hiring relief approved in Morrow v. Dillard, supra; in Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, supra; and even in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 330 n.4 (1977).*

Regardless, the less far reaching affirmative relief imposed here is fully consistent with the forms of affirmative relief approved by a majority of this Court in Bakke. Given defendants' past practices resulting in the employment of a workforce which was only 3.3% minority in a community which was 29.1% minority several years before trial and which shortly will be 40% minority, "there is a sound basis for concluding that minority underrepresentation is substantial and chronic," 57 L.Ed.2d at 816 (Brennan, J.), and "there are no practical

* In Teamsters, this Court addressed the difficult issue of applying remedies to current employees bound by seniority agreements. Not disturbed was the relatively simple 1:1 hiring formula for new employees. Under that formula, "the company obligated itself to hire one Negro or Spanish-surnamed person for every white person hired at any terminal until the percentage of minority workers at that terminal equaled the percentage of minority group members in the population of the metropolitan area surrounding the terminal." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 330 n.4 (1977).

means by which [defendants] could [overcome the effects of their past practices] in the foreseeable future without the use of race-conscious measures," 57 L.Ed.2d at 825 (Brennan, J.).* And, given the judicial findings of past discrimination, the numerical remedy "preferring members of the injured groups at the expense of others" is entirely appropriate "since the legal rights of the victims must be vindicated." 57 L.Ed.2d at 782 (Powell, J.).

The fact that the 1:1:3 hiring ratio was imposed only after due consideration by a federal court gives even greater constitutional credence to the appropriateness of the remedy. The federal courts, in the cases before them, unquestionably have "the authority and capability to establish, in the record, that the classification is responsive to identified discrimination." 57 L.Ed.2d at 783 (Powell, J.). Especially given their duty to remedy past discrimination, Louisiana v. United States, supra, they are unparalleled as jurisdictionally "competent to make those decisions." 57 L.Ed.2d at 783 (Powell, J.).

* The near total exclusion of minorities from the defendants' workforce compels this conclusion. As the court of appeals below observed, "an accelerated hiring order is the only way 'to overcome the presently existing effects of past discrimination within a reasonable period of time.'" 566 F.2d at 1344 (emphasis added).

"Also, the remedial action...remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." 57 L.Ed.2d at 782 (Powell, J.). As Mr. Justice Brennan observed, "claims of rival groups, although they may create thorny political problems, create relatively simple problems for the courts." 57 L.Ed.2d at 815, n.35 (Brennan, J.).

In view of defendants' historically exclusionary practices, the court-imposed affirmative remedy not only is constitutionally permissible but is equitably necessary.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Dated: New York, New York
November 1, 1978

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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 77-1553

COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS OF THE
COUNTY OF LOS ANGELES; and CIVIL SERVICE COMMISSION
OF THE COUNTY OF LOS ANGELES,

Petitioners,

vs.

VAN DAVIS, HERSHEL CLADY, and FRED VEGA, individ-
ually and on behalf of all others similarly situated,
WILLIE BURSEY, ELIJAH HARRIS, JAMES W. SMITH,
WILLIAM CLADY, STEPHEN HAYNES, JIMMIE ROY
TUCKER, LEON AUBRY, RONALD CRAWFORD, JAMES
HEARD, ALFRED R. BALTAZAR, OSBALDO A. AMPARAH,
individually and on behalf of all others similarly sit-
uated,

Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit.

BRIEF OF AMICI CURIAE

**INCORPORATED MEXICAN AMERICAN GOVERNMENT
EMPLOYEES, LEAGUE OF UNITED LATIN AMERICAN
CITIZENS, AMERICAN G.I. FORUM, S.E.R.—JOBS
FOR PROGRESS, INC.**

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In the Supreme Court
Of The
United States

OCTOBER TERM, 1978

No. 77-1553

COUNTY OF LOS ANGELES, et al.,

Petitioners,

vs.

VAN DAVIS, et al.,

Respondents.

BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

The Incorporated Mexican American Government Employees (IMAGE) is a national organization concerned with the public employment of Hispanic Americans, Mexican Americans, Cuban Americans, Puerto Ricans, Central-South Americans, and all those of Hispanic cultural/linguistic heritage. With close to 70 affiliates chartered in 25 states, IMAGE is incorporated in the District of Columbia. IMAGE was created because of the substantial underrepresentation of Hispanics in federal, state, and local employment. For example, although Hispanic Americans comprise over 7% of

the national population, they hold only 3.5% of the 2.4 million federal jobs, 2.4% of the 1.5 million state jobs, and 4.1% of the 2.5 million local/municipal jobs.

The League of United Latin American Citizens (LULAC) is a national civil rights organization with social and cultural functions. Its 50th anniversary year, 1978, has been spent continuing the development of an equitable share of job opportunities for Hispanics. LULAC has been responsible for the formation of Operation SER, the largest Hispanic training program in the country.

The American G.I. Forum is a veteran's family organization composed primarily of Mexican Americans. It had

its beginnings after World War II in the aspirations of returning Mexican American veterans to end the discriminatory social, economic, and political practices that pervaded this country. The organization now has chapters nationwide. One of the main goals of the Forum is the improvement of employment opportunity.

SER-Jobs for Progress, Inc., (SER), is a nonprofit Texas corporation, has been providing employment and training services to economically disadvantaged Hispanics throughout the United States for the past decade. National SER is providing \$2.7 million in training and technical assistance to some sixty local SER/CETA program service deliverers. There are several local SER program

operators that provided employment and training services to economically disadvantaged unemployed residents of the County of Los Angeles. Each of the SER operators, on at least one occasion, has referred qualified Hispanic CETA applicants to the Los Angeles County Fire Department.

QUESTIONS PRESENTED

1. Is Proof of Purposeful Intent to Discriminate Necessary to Make Out a Violation Under 42 U.S.C. §1981?
2. Did the Trial Court Exceed Its Jurisdiction in Fashioning the Remedial Hiring Order in the Judgement Below?

STATEMENT OF THE CASE

Amici rely upon Respondents to set out the factual setting of this case.

ARGUMENT

Amici curiae respectfully urge that the decision below be affirmed; the clear language of the statute, the legislative history, and the relevant case law establish that all discrimination abridging the rights enumerated therein are prohibited under 42 U.S.C. §1981. Consequently, the Court correctly found liability on the part of Petitioners and instituted the remedial hiring order to overcome the discrimination found to exist.

The first question presented in

this case is whether purposeful intent to discriminate need be demonstrated in order to establish a violation under §1981. Amici agree with the trial court, the Ninth Circuit Court of Appeals, and Respondent herein, that an un rebutted showing of adverse impact on Mexican Americans and blacks resulting from selection procedures utilized by the Petitioner is sufficient to establish liability under §1981. Such a result is consistent with the standard of proof of liability under Title VII, 42 U.S.C. §2000(e), et seq.

The second question presented herein is the appropriateness of the remedy ordered below. Amici respectfully submit that federal courts have well recognized broad powers to fashion remedies to end discriminatory conduct

on the part of public entities. Moreover, federal courts are under a duty to order relief which will not only prohibit future discriminatory conduct but also eradicate the present effects of past discrimination.

I. UNDER 42 U.S.C. §1981, A PRIMA FACIE CASE OF EMPLOYMENT DISCRIMINATION CAN BE ESTABLISHED THROUGH A DEMONSTRATION OF ADVERSE IMPACT; PURPOSEFUL INTENT TO DISCRIMINATE NEED NOT BE PROVED.

The Ninth Circuit Court of Appeals, in its opinion below, held that:

". . . [T]here remains no operational distinction in this context between liability based upon Title VII and §1981." 566 F.2d at 1340.

The Court in effect held that a plain-

tiff under 42 U.S.C. §1981 need not prove purposeful intent to discriminate in order to establish a prima facie case; Respondents were required only to demonstrate that the challenged employment practice had a disproportionate adverse impact on the employment contract rights of Mexican American and black applicants.¹

¹The question of racial animus was not at issue; at the time the trial court reached its decision, this Court had not yet handed down its opinion in Washington v. Davis, 426 U.S. 229 (1976).

At the trial level Respondents demonstrated that in 1969, and again in 1972, Petitioners utilized an unvalidated written aptitude test to rank applicants for positions as firefighters. Both the trial and the Court of Appeals found that the written examinations had an adverse impact on minority applicants. Davis v. County of Los Angeles, 8 F.E.P. Cases 239, 240 (C.D. Cal. 1973), 566 F.2d 1334, 1341, (9th Cir., 1977). In 1969 only seven (7%) of the 100 Mexican American applicants who took the exam were hired; of the 244 blacks who took the exam, (cont. next page)

The result of the Circuit Court's holding is to harmonize the standard of liability under §1981 with the standard under Title VII.²

¹ (continued from last page)
just five (or 2%) were hired. By comparison, 175 out of 1,080 (16.2%) white applicants who took the exam were employed by Petitioners. Though Mexican American and black applicants comprised approximately 25% of the group examined, they made up only 6.4% of those hired. Additionally, approximately 16% of white examinees were hired, compared to 7.02% of minority examinees.

The 1972 written exam had a similar impact. Among the top 544 scorers were 25.8% of the white applicants, 11% of the Mexican American applicants, and only 5.1% of the black applicants. 566 F.2d at 1337. Despite this severely disproportionate impact on minorities, no effort was made to validate the tests. 566 F. 2d at 1341.

² 42 U.S.C. §2000(e) et seq. Under the guidelines established in Griggs v. Duke Power Co., 401 U.S. 424 (1971), a prima facie case of discrimination can be established pursuant to Title VII by a demonstration that a challenged employment practice or procedure has a disproportionate impact on the employment opportunities of a protected class. Once such a prima facie case is (cont. next page)

Petitioners contend that the Court's opinion in Washington v. Davis, 426 U.S. 229 (1976), requires proof of purposeful intent to discriminate in order to make out a violation under §1981. However, the decision in Washington v. Davis did not address the question of statutory liability under §1981, but only dealt with the question of whether Title VII standards, with regard to adverse impact and a prima facie showing of discrimination, could be applied in the circumstance of a constitutional challenge. 426 U.S. at 247. Therefore, the question of whether purposeful intent to discriminate is

2 (cont. from last page)
established, the burden shifts to the employer to come forward with a legitimate and necessary business reason which is advanced by the challenged practice. Furnco v. Waters, ___ U.S. ___, 57 L.Ed.2d 957 (1978).

necessary to make out a violation under §1981 is before the Court for the first time.

A. THE PLAIN TERMS OF 42 U.S.C. §1981 AND ITS AFFIRMATIVE NATURE OUTLAW ALL DISCRIMINATION INFRINGING ON THE RIGHTS ENUMERATED THEREIN.

The terms of §1981 support the position that intent is not an element of the statutory violation. 42 U.S.C. §1981 reads:

"All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and

property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

[Emphasis added].

On its face, §1981 is an affirmative guarantee of rights. The plain language of §1981 reflects the congressional intent to outlaw all discrimination infringing on the rights enumerated therein, including the right to contract for employment.³

³ See generally, McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976); Johnson v. Railway Express Agency, 421 U.S. 454 (1975); Garner v. Giarrusso, 571 F.2d 1330 (5th Cir. 1978); Sethy v. Alameda County Water District, 545 F.2d 1157 (9th Cir. 1976) (en banc).

By its terms, §1981 is not limited to redressing only those denials of rights by practices or state law which are the product of blatant racial animus. The broad language of §1981 that "all persons...shall have the same right" also encompasses the unequal availability of rights resulting from subtle or facially neutral, yet equally discriminatory, practices.

Actions and practices not mandated by state laws and which apply to whites as well as non-whites may nevertheless impinge on the rights of racial and ethnic minorities to contract as severely as a blatantly racially motivated law. The fact that Congress intended blacks and other ethnic minorities to have the same rights meant those rights afforded were to be available in fact,

not just in name. Section 1981 by its language is very clearly an "effects" oriented statute. It does not state that all persons shall have the same rights in the face of racially motivated acts; it unequivocally states "all persons" shall have the same rights and any conduct infringing on those rights is unlawful.

When an action is brought pursuant to §1981, the trial court, in determining the merits of the claim, necessarily must focus on measuring whether or not the rights claimed under and enumerated in the statute are available to "all persons" in the same degree in relation to others, i.e., whites. It is only by focusing on the relative measure of rights available to individuals of different racial and ethnic groups

that the Court can determine whether the guarantees of §1981 have been breached.

The question of racial animus is not the determinative issue under §1981. Racial animus or motivation is properly an issue when a statute prohibits specified conduct. This is the case under §1983, which derives from the Civil Rights Act of 1871 and the Fourteenth Amendment.⁴

⁴ Section 1981's predecessor, §1 of the Civil Rights Act of 1866, was reenacted in the Enforcement Act of 1870. That Act was intended to implement the 14th Amendment. However, Congress did not intend by the reenactment to change the goals or interpretations of the provisions. The aim of Congress in including §1, along with other sections of the 1866 Act, into the Enforcement Act of 1870, was to provide machinery for putting the 1870 Act into motion. Cong. Globe, 41st Cong., 2d Sess. 3560 (Sen. Stewart); cf. Sethy v. Alameda County Water Dist., 545 F.2d 1157, 1160 n. 4 (9th Cir. 1976) (en banc); Jones v. Alfred Mayer Co., 392 U.S. 409 (1968); Young v. International Tel. & Tel. Co., 438 F.2d 757, 759-60 (3rd Cir. 1971).

However, when a statute such as §1981 guarantees rights to individuals the focus is on whether conduct, law, or practices infringe on those rights; the question is not whether the discrimination was purposeful but whether it existed.

Consequently, under the terms of §1981, it is enough that employment discrimination plaintiffs isolate and identify actions or practices that have an adverse impact on their right to gain employment, or that there is a disparity based on race or ethnicity. They need not show that defendants intended to affect minorities adversely.

B. THIS COURT HAS BROADLY CONSTRUED
THE LANGUAGE OF THE 1866 CIVIL
RIGHTS ACT TO PROHIBIT ALL

DISCRIMINATION IN CONTRACTS
AGAINST ANY PERSONS OR GROUPS.
THIS CONSTRUCTION IS CONSISTENT
WITH THE INTENT OF CONGRESS IN
ENACTING THE CIVIL RIGHTS ACT OF
1866.

It is clear beyond dispute that the guarantees of §1981 apply to employment contracts. The Court in Johnson v. Railway Express Agency, 421 U.S. 454 (1975), joined the Courts of Appeals in holding that §1981 affords a federal remedy against discrimination in private employment. 421 U.S. at 460-64. Public entities as well are subject to the coverage of §1981 with regard to employment. Garner v. Giarrusso, 571 F.2d 1330 (5th Cir. 1978); Sethy v. Alameda County Water District, 545 F.2d 1157

(9th Cir. 1976) (en banc).

Although §§1981 and 1982 were long neglected as a means of redressing discrimination, courts have recently recognized the sweeping protections intended by the Congress in the enactment of the Civil Rights Act of 1866, from which both §§1981 and 1982 derive.

Section 1981 derives from §1 of the Civil Rights Act of 1866.⁵ Although the immediate impetus for the passage of the 1866 Act was to give effect to

⁵ Hereinafter referred to as the "1866 Act". Act of April 9, 1866, c. 31, 14 Stat. 27. Section 1 of the Act was reenacted in the Enforcement Act of 1870. Act of May 31, 1870, c. 16, 16 Stat. 44, and was codified as §1977 of the Revised Statutes of 1874.

the Thirteenth Amendment,⁶ it was recognized even then by opponents as well as proponents of the bill that the 1866 Act had a broader reach than would have been necessary to meet the particular and immediate plight of the newly freed Negro slaves. Accordingly, §§1981 and 1982 have been read to prohibit private discrimination in the sale of property, Jones v. Alfred Mayer Company, 392 U.S. 409 (1968), employment discrimination against whites, McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273

⁶ In introducing the bill, Senator Trumbull remarked:

"This measure is intended to give practical effect to that declaration [the Thirteenth Amendment] and secure to all persons within the United States practical freedom."
Cong. Globe, 39th Cong., 1st Sess. 474.

(1976), and aliens, Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974), as well as blacks, and discrimination by private schools in excluding black children. Runyon v. McCary, 427 U.S. 160 (1976). This is in keeping with the sponsors' view that "...[T]he very object of the bill (the 1866 Act) is to break down all discrimination..."⁷

⁷ Senator Trumbull stated near the end of Senate debates on the measure:

"Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the rights to buy and sell, and enjoy liberty and happiness. ...a bill, the only object of which is to secure equal rights to all the citizens of the country, a bill that protects a white man just as much as a black man. With what consistency and with what face can a Senator in his place here say to the Senate and to the Country that this is a bill for the benefit of black men exclusively when there is no such distinction in it, and when the very"
(cont. next page)

Opponents of the bill criticized the bill on this very basis, charging that it would sweep too broadly and invalidate any and all statutes which made a distinction based on race. In the House, Representative Kerr opposed the bill partly because its reach would extend to laws in any state making discrimination on the basis of race for purposes such as licensing illegal. He noted as he read that the bill, an Indiana statute allowing only whites to engage in the retail liquor business, would be invalid and those who attempted to uphold it would be liable under the Act.⁸

⁷ (cont. from last page)
object of the bill is to break down all discrimination between black men and white men." (emphasis added). Cong. Globe, 39th Congress, 1st Sess. at 599.

⁸ Cong. Globe, 39th Congress, 1st Sess. 1271.

On the Senate side, Mr. Johnson argued against the bill by stating that laws in any state, including those outside the South, prohibiting marriage contracts between blacks and whites would be invalidated by the Act, even if such were not an intended purpose of the bill.⁹

⁹Mr. Johnson stated:

"I mention that for the purpose of applying it to one of the provisions of the bill. What is to be its application? There is not a State in which these negroes are to found where slavery existed until recently, and I am not sure that there is not the same legislation in some of the States where slavery has long since been abolished, which does not make it criminal for a black man to marry a white woman, or for a white man to marry a black woman; ... Do you not repeal all that legislation by this bill? I do not know that you intend to repeal it; but it is not clear that all such legislation will be repealed..." Id. at 505.

Consistent with the intent of Congress to enact a sweeping measure, this Court and lower federal courts have read the operative language of §§ 1981 and 1982 broadly.

The seminal case by the Court involving the reach of the statutes deriving from Section 1 of the Civil Rights Act of 1866 is the Court's decision in Jones v. Alfred Mayer Co., 392 U.S. 409 (1968) in which private racial discrimination in the sale or rental of real or personal property was held prohibited by § 1982. The Court in Jones reasoned that Congress intended just what the terms of the 1866 Act suggest:

"To prohibit all racial discrimination, whether or not under the color of law, with respect to the rights enumerated therein - including the right to purchase or lease

property." 391 U.S. at 436.

More recently, the Court relied upon the holding in Jones to find that § 1981 prohibits private schools from excluding qualified children solely because they are black. In Runyon v. McCary, 427 U.S. 160 (1976), the Court found that the practice of excluding black children from schools, which advertised and offered educational services to the public, was a classic violation of § 1981. The Court reached that conclusion in the face of arguments asserting constitutional rights to privacy and freedom of association. The Court in Runyon noted that both §§ 1981 and 1982 derive from § 1 of the Civil Rights Act of 1866 and that the Court's reasoning for its decision in Jones, prohibiting private racial discrimination in the sale of property, was equally applicable to racial discrimination

by private schools. The Court in Runyon specifically cited the broad holding in Jones that the 1866 Act was designed to prohibit all racial discrimination.

The Court has also read the language of the 1866 Act broadly with regard to the persons benefited by the guarantees of the statute. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) held that § 1981 prohibits racial discrimination in private employment against whites as well as non-whites. The Court in McDonald relied on both the plain language of § 1981 and the legislative history of the 1866 Act for its holding that the statute "explicitly applies to 'all persons' (emphasis added) including white persons." 427 U.S. at 287. In its discussion of the legislative history of the 1866 Act, the Court noted that the immediate impetus for the bill

was the necessity for effective relief of the newly freed black slaves, but went on to hold that:

"...the general discussion of the scope of the Bill did not circumscribe its broad language to that limited goal. (On the contrary, the Bill was routinely viewed, by its opponents and supporters alike, as applying to the civil rights of whites as well as non-whites.)" 427 U.S. at 289.

Similarly, the protection of §1981 has been held on several occasions to apply to aliens. In Graham v. Richardson, 403 U.S. 365 (1971), this Court held that state laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with both national policies on immigration constitutionally committed to the Federal Government and §1981's declaration that "...all persons shall have the same rights in

every state and territory. . . to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens..." 403 U.S. at 372. The Fifth Circuit in Guerra v. Manchester Terminal Corporation, 498 F.2d 641 (5th Cir. 1974) held that employment discrimination against aliens is similarly prohibited by § 1981.

C. THE SHARED PURPOSE OF § 1981 AND TITLE VII - TO END ALL EMPLOYMENT DISCRIMINATION - REQUIRES THAT THE TWO STATUTES BE HARMONIZED ON THE QUESTION OF PROOF OF LIABILITY.

Section 1981 is widely recognized by this and lower federal courts as an important means of combating employment discrimination as well as a wide range

of other discriminatory conduct. As is true under Title VII, a person making out a case under § 1981 has available a spectrum of remedies to redress employment discrimination. Johnson v. Railway Express Agency, supra, at 460. To require that plaintiffs prove purposeful intent to discriminate on the part of defendants in order to make out a violation under § 1981 would greatly reduce its availability as an effective tool for Mexican American and other historically disadvantaged ethnic and racial groups. Moreover, such a requirement would create confusion in the area of employment discrimination law by requiring a different standard of proof under the two most important statutory remedies available to an aggrieved party.

Petitioners argue that § 1981 should be harmonized with §§ 1983 and 1985 on

the standard of proof required to make out a violation under each of the respective statutes.¹⁰

Petitioners argue that both §1983 and §1985 require proof of purposeful intent in order to establish liability

¹⁰ Petitioners also cite Jones v. Alfred Mayer Co., 392 U.S. 409 (1968), for the proposition that §1982 also requires proof of purposeful intent to establish liability thereunder. Petitioners' reliance is misplaced; in Jones the Court was presented with factual circumstances where purposeful intent was clearly present. The Court has never addressed a factual setting where liability under §1982 was claimed without a demonstration of purposeful intent. Amici would argue that, given the nature of §1982 and its historical relation with §1981, purposeful intent would not be required where a facially neutral practice had a disproportionate adverse impact on the rights of blacks, Mexican Americans, or whites to buy or sell real or personal property. But that issue is not presented here.

under either.¹¹ However, an examination of the statutes reveals a crucial distinction between §1981 and §§1983 and 1985.

As indicated earlier, §1981 is affirmative in nature; it was enacted to effectively implement the Thirteenth Amendment's mandate to end all vestiges of involuntary servitude, and by its language guarantees the same enjoyment of

¹¹ Proof of purposeful intent may be required under §1983 after the Court's decision in Washington v. Davis, *supra*, where the right alleged to have been abridged derives from the Constitution. However, it is unclear whether the same requirement would apply if an action brought under §1983 claimed the violation of a statutory right rather than one of a constitutional nature. Therefore, Petitioners' broad assertion that purposeful intent is required under §1983 is not entirely justified.

Section 1985, on the other hand, by its very language, requires a showing of purpose in order to make out a violation under that anti-conspiracy statute.
(cont. next page)

the rights enumerated therein to "all persons". Sections 1983 and 1985, on the other hand, are prohibitory in nature. They focus not on the measure of rights to be enjoyed by persons seeking protection thereunder, but rather are explicit bans against discriminatory conduct by individuals. Consequently, in determining liability under those statutes, courts must examine the nature of the action of the particular individual, including the person's motivation for engaging in the questioned conduct.

11 (cont. from last page)

"(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving..."
42 U.S.C. §1985(3). (emphasis added)

See also, Griffin v. Breckenridge, 403 U.S. 88, 96-97 (1971).

This view is also consistent with the divergent history of the respective statutes. Sections 1983 and 1985 had their genesis in the Civil Rights Act of 1871,¹² which was enacted as a federal prohibition against conduct violative of the Fourteenth Amendment. By contrast, §1981 derives from the Civil Rights Act of 1866, which was enacted to effectively secure the guarantees of the Thirteenth Amendment.¹³

¹² Civil Rights Act of 1871, 17 Stat. 13. See Monell v. New York City Department of Social Services, ___ U.S. ___, 56 L.Ed.2d 611 (1977); Griffin v. Breckenridge, 403 U.S. 88, 98-99 (1971).

¹³ Although §1 of the 1866 Act was reenacted in the Enforcement Act of 1870, Congress did not intend the reenactment to change the goals or interpretations of the provision. Section 1 was included as a means of providing a mechanism for putting the 1870 Act into motion. Cong. Globe, 41st Cong., 2d Sess. 3560 (Sen. Stewart); see also note 4, supra, at 17.

The difference in the purposes to be served by the respective statutes argues against the need for them to require the same standard of proof to make out a violation under each.

A more forceful argument can be made for §1981 to be read in harmony with Title VII, which does not require proof of purposeful intent to discriminate. Congress, in enacting Title VII as a mechanism to deal with employment discrimination on the basis of race, national origin, religion, and sex, did not intend to eliminate §1981 as a means of combating employment discrimination on the basis of race, ethnicity, and alienage.¹⁴

¹⁴ While amending Title VII in 1972 to include public employers, Congress specifically rejected an amendment which would have deprived a claimant of any right to sue under §1981. 118 Cong. Rec. 3371-3373 (1971). (cont. next page)

As this Court has observed in the past, §1981 and Title VII are directed to most of the same ends. Johnson v. Railway Express Agency, 421 U.S. at 461. Rather than being mutually exclusive, the two statutes augment one another and provide overlapping and related remedies against employment discrimination. Johnson v. Railway Express Agency, 421 U.S. at 459. Consequently, the standards for proof of liability under the two statutes

14 (cont. from last page)

See also comments of Senator Williams in support of the need for retaining §1981 as a remedy to employment discrimination:

"This is especially true where the legal issues under other laws may not fall within the scope of Title VII or where the employee, employer, or labor organization does not fall within the jurisdictional confines of Title VII. These situations do exist, and I am sure that it is unnecessary to spell them out at this point." Id. at 3372.

should be harmonized. Proof of discriminatory impact against an identifiable and protected group should be sufficient to demonstrate a prima facie case of discrimination under §1981, as is the case for groups protected by Title VII.

It is important to note here that such a showing of adverse impact does not constitute resolution on the ultimate issue of liability, but rather shifts the burden to an employer to demonstrate a legitimate business reason for the use of the particular practice which is challenged. Furnco Construction Corp. v. Waters, 57 L.Ed. 2d, at 967. If the employer can do so, then the plaintiff has an opportunity to show that "the proffered justification is merely a pretext for discrimination." Furnco Construction Corp. v. Waters, supra, at

968. But if the employer fails to come forward with a legitimate business reason for the use of the challenged procedure or practice, the prima facie showing will be determinative. (See generally, International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); Griggs v. Duke Power Co., supra.)

Such harmony will protect both employers and employees. It will allow groups subject to discrimination on a basis other than those covered by Title VII to receive protection. It will also allow protection for individuals against discriminatory conduct by employers who are not under the coverage of Title VII. With regard to employers, they will be judged pursuant to a single standard of conduct. They would be subject to liability or free of liability under either

statute according to one rule. Consequently, they need not confront the dilemma of being in compliance under one statute and out of compliance under another.

II. THE ISSUANCE OF THE REMEDIAL HIRING ORDER HEREIN WAS WITHIN THE JURISDICTION OF THE DISTRICT COURT.

The second question presented in this case is whether the District Court exceed its jurisdiction when it issued a mandatory interim hiring order to remain in effect until such time as the percentage of Mexican Americans and blacks employed by the Los Angeles County Fire Department approximated the percentage of those groups in the general population of Los Angeles County.

It is important to note that Petitioners here do not, and this case does not, require consideration of the broad question of when affirmative action or quota hiring is proper. Petitioners challenge whether the circumstances of this case, on these facts, make the mandatory hiring ordered by the trial court appropriate. As to the broader question, lower courts are unanimous that both affirmative action and quota hiring are available as remedies for past discrimination in appropriate circumstances.

This Court has on numerous occasions noted that federal courts have been armed with broad powers to fashion remedies in cases involving employment discrimination in violation of Title VII, Albermarle Paper Co. v. Moody, 422 U.S. 405, 418

(1975); Franks v. Bowman, 424 U.S. 747, 763 (1976); cf United Jewish Organizations of Williamsburgh v. Carey, 430 U.S. 144 (1977), including equitable powers with their historic purpose of securing "complete justice." Albermarle, supra, 422 U.S. at 418. Likewise, this Court and lower federal courts have consistently recognized the power available under §1981 to fashion the full range of legal and equitable remedies, Johnson, supra; see also Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 243 (5th Cir. 1974), to overcome barriers to equal right to contract for employment.

A district court in determining the specific remedy to be afforded in an employment discrimination case is "to fashion such relief as the particular circumstances of a case may require to effect restitution." Internat'l. Bro-

therhood of Teamsters v. United States,
431 U.S. 324, 364 (1977), citations omit-
ted. In addition:

"Where racial discrimination is
concerned, 'the (district) court
has not merely the power but the
duty to render a decree which will
so far as possible eliminate the
discriminatory effects of the past
as well as bar like discrimination
in the future.' Louisiana v. United
States, 380 U.S. 145, 154 (1965)."
422 U.S. at 418.

The use of mathematical ratios in
shaping a remedy has been recognized by
the Courts as well within the equitable
remedial power and discretion of the fed-
eral courts. Swann v. Charlotte-Mecklen-
burg Board of Supervisors, 402 U.S. 1,
25 (1971). Eight Courts of Appeals have
considered and approved the exercise of
this discretion and power in the formu-
lation of accelerated hiring goals or
quotas to eradicate the effects of past

discrimination. See:

Boston Chapter NAACP, Inc., v.
Beecher, 504 F.2d 1017 (1st Cir.
1974), cert. denied, 421 U.S.
910 (1975) (§§1981 and 1983, Title
VII);

Vulcan Society v. Civil Service
Commission, 490 F.2d 387 (1st Cir.
1973), cert. denied, 416 U.S. 957
(1974) (Title VII);

Castro v. Beecher, 459 F.2d 725
(1st Cir. 1972) (§1983);

Rios v. Enterprise Ass'n. Steamfit-
ters Local 638, 501 F.2d 622 (2nd
Cir. 1974) (Title VII);

Bridgeport Guardians, Inc. v. Civil
Service Commission, 482 F.2d 1333
(2nd Cir. 1973), cert. denied, 421
U.S. 991 (1975) (§§1981, 1983);

United States v. Wood Lathers Local
46, 471 F.2d 408 (2d Cir. 1973),
cert. denied, 412 U.S. 939 (1973)
(Title VII);

Pennsylvania v. O'Neill, 473 F.2d
1029 (3rd Cir. 1973) (en banc)
(§1983);

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(3rd Cir. 1971), cert. denied, 404
U.S. 854 (1971) (Title VII);

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495 F.2d 398 (5th Cir. 1974),
modified 424 U.S. 747 (1976)
(Title VII);

Morrow v. Crisler, 491 F.2d 1053
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denied, 419 U.S. 895 (1974) (\$1983);

Asbestos Workers v. Volger, 407 F.2d
1047 (5th Cir. 1969) (Title VII);

United States v. Masonry Contractors
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871 (6th Cir. 1974) (Title VII);

United States v. Local 212, IBEW,
472 F.2d 634 (6th Cir. 1973)
(Title VII);

United States v. Carpenters Local
169, 457 F.2d 211 (7th Cir. 1972),
cert. denied, 409 U.S. 851 (1972)
(Title VII);

United States v. N.L. Industries,
479 F.2d 354 (8th Cir. 1973) (en
banc) (\$1983);

Carter v. Gallagher, 452 F.2d 315
(8th Cir. 1971) (en banc), cert.
denied, 406 U.S. 950 (1972) (\$1983);

United States v. Ironworkers Local
86, 443 F.2d 544 (9th Cir. 1971),
cert. denied, 404 U.S. 984 (1971)
(Title VII);

Such accel rated hiring orders do
not conflict with §703(j) of Title VII,
42 U.S.C. §2000(e)(2)(c). Section 703(j)
in pertinent part provides that an em-
ployer may not be required:

"to grant preferential treatment to
any individual or group on account
of an imbalance which may exist with
respect to the total number or
percentage of persons of any race...
in comparison with the total number
or percentage of persons of such
race...in any community."

That language was intended to bar prefer-
ential quota hiring as a means of changing
racial imbalance attributable to causes
other than unlawful discriminatory con-
duct. Rios v. Enterprise Ass'n. Steam-
fitters Local 638, 501 F.2d 622, 630 (2nd
Cir., 1974); United States v. Wood, Wire,
and Metal Lathers International Union Lo-
cal 46, 471 F.2d 408, 413 (2nd Cir. 1973).
Where past discrimination is shown, and

ratio hiring remedies that past discrimination, the order is not "preferential treatment" in violation of §703(j).

The Court's decision in Regents of the University of California v. Bakke, ___ U.S. ___, 57 L.Ed.2d 750 (1978), supports this view. The opinion of Justice Powell, expressing the Court's judgement, supports the use of affirmative hiring orders such as the one ordered by the trial court in the instant case where necessary to remedy discriminatory conduct and its effects. In Bakke, Justice Powell found that the Davis special admissions program violated the Fourteenth Amendment because it was "undeniably" a classification based on race and ethnic background which afforded preferential treatment for individuals from certain minority groups. Justice Powell found persuasive the factual circumstances

presented to the Court where there was an absence of any finding by the trial court or an admission by the University of past discriminatory conduct on the part of the University.¹⁵ The University in Bakke had argued that the special admissions program was necessary to redress societal discrimination and that the Court in the past had validated preferential treatment in other circumstances, specifically in the areas of education, employment, and sex discrimination.

Justice Powell in his opinion pointed out that in each of the areas cited by the University as supporting the use of preferential treatment, there had been a finding of discrimination in the parti-

¹⁵The University denied, and the Court assumed, that it had not discriminated in the past.

cular instances and that the preferential treatment accorded was the means chosen to remedy the discrimination found to exist. The discussion by Justice Powell of the employment cases is especially pertinent to the issue of the appropriateness of the hiring order in the instant case. The cases demonstrate that quotas are not in all circumstances unjustified preferential treatment for minority groups or reverse discrimination and therefore illegal. For example, he noted with approval Franks v. Bowman, 424 U.S. 747 (1976), wherein the Court approved a retroactive award of seniority to a class of black truck drivers who had been the victims of discrimination. Justice Powell's citation of the Franks case is significant because the remedy ordered was determined to outweigh the infringe-

ment of seniority rights of innocent white employees. The Court in Franks had determined that the need to compensate the black employees for the discrimination which had been practiced by the employer took precedent over the seniority expectations of white employees. 424 U.S. at 775-780.

Also cited by Justice Powell were two lower court decisions approving issuance of ratio hiring orders as remedies for constitutional or statutory violations resulting in identified, race-based injuries.¹⁶ For Justice Powell,

¹⁶ 57 L.Ed.2d at 778, citing Bridgeport Guardians, Inc. v. Civil Service Commission, 482 F.2d 1333 (2nd Cir. 1973) (1/1 hiring ratio approved); Carter v. Gallagher, 452 F.2d 315, modified on rehearing en banc, 452 F.2d 327, 329 (8th Cir. 1972) (3/1 hiring ratio approved.)

Justice Powell's citation of the Carter v.
(cont. next page)

preferential treatment is not reverse discrimination, and therefore illegal, as long as the remedy fashioned serves to correct identified discrimination found to exist by a court or responsible government agency.¹⁷

The concurring opinion by Justice Brennan also supports the use of remedies involving preferential treatment, such

¹⁶ (cont. from last page)

Gallagher decision, supra, is particularly noteworthy in that it was an action brought under §1981.

¹⁷ "The courts of appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference. Such preferences also have been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination." 57 L.Ed.2d at 778. (citations omitted, emphasis added).

as ratio hiring orders, in employment cases. In Bakke, Justice Brennan read prior decisions by the Court to approve the use of preferential treatment as a means of remedying past discrimination, including its present effects. Justice Brennan, however, also argued that such remedies were appropriate even absent a showing of specific discriminatory conduct, as long as it could be demonstrated that the action complained of had an adverse and unjustified impact upon members of racial minorities.¹⁸ The key for Justice Brennan is that the existence of discrimination, or the present effects of

¹⁸ Bakke, 57 L.Ed.2d at 817-818, Brennan, J., concurring, citing McDaniel v. Barresi, 402 U.S. 39 (1971); United Jewish Organizations of Williamsburgh v. Carey, 430 U.S. 144 (1977); Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Sheven, 416 U.S. 351 (1974); Katzenbach v. Morgan, 384 U.S. 641 (1966).

past discrimination, justifies taking race into account in order to fashion a remedy to effectively overcome the discrimination. Under such an analysis, the quota hiring remedy ordered by the trial court in this instance would be clearly valid.

It is important to point out here that the opinion by Justice Stevens does not adopt a position that preferential hiring orders are not appropriate remedies in employment cases. Justice Stevens, in his opinion, did not address the larger question of when race can be used as a factor in an admissions program or in other settings. His opinion was specifically limited to whether Bakke as an individual had been discriminated against on the basis of his race. Bakke, 57 L. Ed.2d at 845. (Stevens, J., concurring).

Nowhere in his opinion did Justice Stevens state or imply that preferential treatment could not be used to remedy prior discrimination. On the contrary, note 22 seems to imply that preferential treatment beyond "special recruitment policies" would be appropriate in the circumstances where a discriminatory policy was in effect.¹⁹

The district court held that the prospective hiring order was "necessary to overcome the presently existing existing effects of past discrimination." Davis v. County of Los

¹⁹ Bakke, 57 L.Ed.2d at 851, note 22. By stating that "affirmative action" refers to "special recruitment policies" where no discriminatory policy exists, Justice Stevens leaves open a wider definition for "affirmative action" where a discriminatory policy does exist.

The order by the district court is well within the scope of the remedies available to district courts when unlawful employment discrimination has been found.

Angeles, 8 FEP Cases 239 (C.D. Cal. 1973). The Court cited in support of its order an unrebutted prima facie case established by severe underutilization of Mexican Americans and blacks in Petitioners' workforce²⁰ and of Petitioners' intentional use of an unvalidated written exam.²¹

The district court's finding of discrimination in this case, affirmed by the Ninth Circuit, is sufficient basis

²⁰At the time this action was brought, the minority population of the County of Los Angeles was 29.1% of the total, 18.3% Mexican American and 10.8% black. At the same time, only 3.3% of the firefighters employed by the Petitioners were Mexican American or black. Of the Los Angeles County Fire Department workforce of 1,762 firefighters, fifty (2.8%) were Mexican American and nine (0.5%) were black. Opinion of the trial court below, 8 FEP 239, at 240.

²¹See note 1, supra, at 10-11.

for a preferential hiring order consistent with the Court's view in Bakke. Moreover, the hiring order by the district court below is well within the scope of the equitable powers and discretion of federal courts to fulfill their duty to eliminate present effects of past discriminatory conduct, while barring like discrimination in the future. Teamsters, supra, 431 U.S. at 364.

IV

CONCLUSION

The plain language, affirmative nature, and purpose to be served by §1981 require that proof of purposeful intent to discriminate need not be demonstrated to make out a violation under the statute. The severe underrepresentation of minorities in Petitioners'

labor force, combined with the use of unvalidated exam procedure which had a demonstrated adverse impact on minorities, establishes a prima facie case of discrimination under §1981, justifying the exercise of the trial court's remedial power and discretion to fashion the quota hiring order below. For the foregoing reasons, the opinion of the Ninth Circuit Court of Appeals below should be affirmed. However, if the Court finds that the Court of Appeals applied an erroneous standard below, case should be remanded for further development of the Record and the Court should withhold judgement on the question of the power of federal courts to use numerical remedial hiring orders where

appropriate and under correct standards.

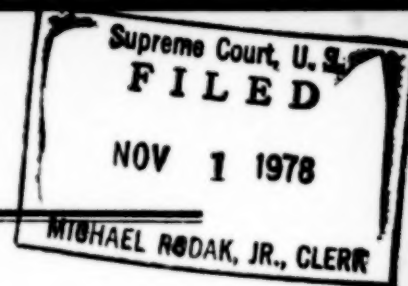
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October 30, 1978



IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1553

COUNTY OF LOS ANGELES, et al.,

Petitioners,

v.

VAN DAVIS, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF *AMICUS CURIAE* FOR THE
N.A.A.C.P. LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.**

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 77-1553

=====

COUNTY OF LOS ANGELES, et al.,

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On Writ of Certiorari to the United
States Court of Appeals for the
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=====

BRIEF AMICUS CURIAE FOR THE
N.A.A.C.P. LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.

=====

INTEREST OF AMICUS

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation established under the laws of the State of New York. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes

include rendering legal services gratuitously to Negroes suffering injustice by reason of racial discrimination. For many years attorneys of the Legal Defense Fund have represented parties in employment discrimination litigation before this Court and the lower courts. The Legal Defense Fund believes that its experience in employment discrimination litigation may be of assistance to the Court.^{1/}

SUMMARY OF ARGUMENT

The "racial quota hiring order" that is the subject of Question 2 has never been implemented as such. Instead the petitioners, in compliance with an unchallenged portion of the district court's injunction, have deliberately interviewed large numbers of minority applicants. But the actual rating and hiring decisions are made without regard to race. Because this affirmative action in interviewing consistently results

^{1/} Letters of consent to the filing of this brief have been filed with the Clerk.

in hiring blacks and Mexican-Americans in numbers greater than the "racial quota hiring order", that order has never been, and is unlikely to become, operative.

The 1866 Civil Rights Act forbids racially neutral practices which perpetuate the effect of past discrimination. The relevant provisions of the Black Codes, which the Civil Rights Act was intended to annul, were generally neutral on their face, and penalized newly freed slaves by perpetuating past discrimination. Petitioners' written examinations perpetuate the effects of widespread de jure discrimination in the California schools. Gaston County v. United States, 395 U.S 285 (1969).

ARGUMENT

1. THE "RACIAL QUOTA HIRING ORDER" HAS NOT IN FACT BEEN APPLIED TO PETITIONERS, AND QUESTION TWO IS THUS NOT ACTUALLY PRESENTED BY THIS CASE.

The second Question Presented contained in the petition relates to whether the district court erred in imposing "a racial quota hiring order." Petitioners' statement of the case recites that after finding liability,

[a]s a remedy, the [district] court ordered that the County hire all future entry level firemen in accordance with a hiring quota of 20% black and 20% Mexican-American until such time as the percentage representation of those minorities in the entire Fire Department in all ranks equaled their representation in the County's general population. Brief for Petitioners, p.6.

Petitioners further state that after 1972,

[a]ll subsequent hiring has been pursuant to the trial court's 40% preferential minority hiring order of July, 1973. Brief for Petitioners, p. 9.

The clear implication of these assertions is that the "quota hiring order" was the sole injunction entered by the district court, that it was an unconditional order, and that petitioners complied with that order by establishing a rigid quota system, consciously hiring, regardless of ability, 1 black and 1 Mexican-American for every 3 whites. The facts appear to be otherwise.

The district court's decision contains four primary substantive requirements, of which only the first two are unconditional. Paragraph one is a general injunction against discrimination. Paragraph two mandates in general language that petitioners take steps to increase minority employment, but contains no specific direction as to how this is to be done.

Defendants shall in good faith make all affirmative action efforts reasonably possible and necessary to increase the black and Mexican-American participation rates in the fireman workforce at the Los Angeles County Fire Department until such time as those participation rates are commensurate with the black and Mexican-American population percentages of Los Angeles County.

What is "reasonably possible and necessary" is left to the discretion of the petitioners; paragraph two does not itself mandate a quota or any form of race-conscious hiring. Certiorari was not sought as to the propriety of the injunctive provisions of paragraphs one and two. Paragraphs three and four state that "a minimum of twenty percent (20%) of all new employees . . . shall be blacks" and Chicanos. But paragraphs three and four are obviously of no operative significance if the actions taken to comply with paragraphs one and two result in minority hiring over the 40% floor. Thus paragraphs three and four are contingent in nature; so long as compliance with paragraphs one and two is resulting in substantial minority hiring, paragraphs three and four do not apply and impose no additional obligation on petitioners.

That is precisely what has occurred in this case. The hiring procedure adopted by petitioners to comply with paragraphs one and two is as follows. To fill each group of vacancies petitioners interview 500 applicants who passed their written examination, including the highest scoring 300 whites, 100 blacks and 100 Mexican-Americans. The number of whites interviewed is several times the number of actual vacancies. The interviewers rate each of these applicants on his or her merits without regard to race or national origin. Thereafter applicants are hired solely on the basis of the score given by the interviewer, again without regard to race or national origin. The actual hires are not from separate lists, no quotas are used, and the same rating standards are applied to all applicants. The interviewers are not authorized to give extra points because of an applicant's race or national origin, but are directed only to be alert for talented minority applicants. This racially neutral procedure, adopted pursuant to paragraphs one and two, has resulted in every year since 1972 in a minority hiring level which consistently, though by varying amounts, exceeded 50%. Thus paragraphs three and four simply have never gone into effect.

Petitioners do not contend that their present hiring procedure is likely in the future to result in a lower level of minority hiring, and there is nothing in the record suggesting that this will occur. Indeed, at the present rate of hiring, minority employment at the Los Angeles Fire Department is likely to reach population levels by around 1981, at which time the entire injunction will become inoperative. Nor do petitioners assert that, even if they should prevail on the liability issue, they would alter their present procedures. Compare DeFunis v. Odegaard, 416 U.S. 312 (1974). It is thus unlikely that an advisory opinion by this Court with regard to the propriety of paragraphs three and four would ever have any impact on the outcome of this litigation or the conduct of the petitioners.

Under these circumstances the dispute as to whether the district court order should have included paragraphs three and four seems moot. This aspect of "[t]he case has . . . lost its character as a present, live controversy of the kind that must exist if [the Court is] to avoid advisory opinions on abstract questions of law." Hall v. Beals, 396 U.S. 45, 48 (1969). There may

be a remote possibility that some peculiar turn of events might render operative the disputed paragraphs prior to their expiration in two or three years, "[b]ut such speculative contingencies afford no basis for . . . passing on the substantive issues" which petitioners would have the Court decide. Id. at 49. Even if these circumstances fall short of mootness, they are very different than those suggested by the Petition. We do not think certiorari would have been granted had it been clear that the relevance of this issue to the parties was at best "wholly conjectural." Golden v. Zwickler, 394 U.S. 103, 109 (1969). Accordingly we suggest that the grant of certiorari as to Question 2 appears to have been improvident.

Even if the district court had issued an unconditional order directing that firemen be hired on the basis of a quota, that relief would have been justified by the serious and long standing violation of 42 U.S.C. §1981 involved in this case.

II. PETITIONERS' HIRING PRACTICES PERPETUATED THE EFFECT OF PAST DISCRIMINATION IN VIOLATION OF 42 U.S.C. §1981.

The parties urge the Court to decide whether section 1981 prohibits non-job related employment criteria with an adverse impact on minorities, a prohibition already contained in Title VII in light of Griggs v. Duke Power Co., 401 U.S. 158 (1971). They assume that this difficult issue turns on whether section 1981 should be construed in pari materia with Title VII or with the Fourteenth Amendment. Amicus suggests that the Griggs issue need not be reached, since section 1981 clearly forbids practices which have the effect of perpetuating past intentional discrimination, and the hiring practices in this case had just that effect. We further suggest that questions regarding construction of section 1981 cannot, in general, be resolved by simply seeking to analogize it to either the Fourteenth Amendment or Title VII.

Petitioners' assertion that Congress intended the substantive requirements of section 1981 to be the same as those of section 1 of the Fourteenth Amendment is refuted by the very language and established construction of those provisions. In important areas the Amendment is

broader than section 1981. The equal protection clause forbids discrimination generally; Congress expressly considered and rejected proposals to include such a provision in the 1866 Civil Rights Act.^{2/} The Fourteenth Amendment also guarantees due process of law and "the privileges and immunities of citizens of the United States," but section 1981 contains no such protections. On the other hand, section 1981 prohibits discrimination by private parties in a variety of specific areas, Runyon v. McCrary, 427 U.S. 160 (1976); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), but the Fourteenth Amendment does not. Section 1981 was originally enacted as part of section 1 of the 1866 Civil Rights Act to enforce the Thirteenth Amendment. Although the 1866 Civil Rights Act was subsequently reenacted in 1870 after the adoption of the Fourteenth Amendment, this was done, not to make the Fourteenth Amendment the sole basis of the 1866 Act, but to expand the group protected by the Act from "citizens of the United States"^{3/} to "all persons within the

^{2/} See Cong. Globe, 39th Cong., 1st Sess., pp. 1266 (remarks of Rep. Bingham), 1366 (remarks of Rep. Wilson).

^{3/} 14 Stat. 27.

jurisdiction of the United States" in order to protect aliens, particularly Chinese in California.^{4/}

The most important connection between the 1866 Civil Rights Act and the Fourteenth Amendment is that they were enacted by the same Congress only two months apart, and that one of the primary purposes of the Amendment was to incorporate certain of the guarantees of the Act into the Constitution. Hurd v. Hodge, 334 U.S. 24, 32 (1948). Because both enactments "were expressions of the same general congressional policy," id., section 1981 should be construed, as to the specific subjects to which it applies, at least as broadly as the Fourteenth Amendment. But since Congress clearly intended that in certain respects the statute would be broader than the Fourteenth Amendment, limitations as to the scope of the Amendment cannot automatically be read into section 1981 itself.

^{4/} Cong. Globe, 41st Cong., 2d Sess., p. 3658. Senator Stewart explained that under the bill "We will protect Chinese aliens or any other aliens whom we allow to come here, and give them a hearing in our court; let them sue and be sued; let them be protected by all the laws and the same laws that other men are." See also id. p. 3807. The proposal to reenact the 1866 Act was originally part of S. No. 865, id. p. 3409, which was referred to at the time as "The Chinese bill." Id. p. 3702 (remarks of Sen. Thurman).

On the other hand, the 1866 Act in many instances cannot be construed simply by referring to other civil rights legislation. First, there may be several other civil rights statutes covering the same subject matter which may not set identical substantive or procedural standards. In the instant case, although Title VII does not require proof of discriminatory intent, Title VI, which also applies to hiring under certain circumstances, may establish a different rule, see Regents of University of California v. Bakke, 57 L.Ed.2d 750, 767-69, 795-803 (1978), and the anti-discrimination provision of the Revenue Sharing Act, 31 U.S.C. §1242(a), could have even another meaning. Similarly, if a dispute arose as to whether the principle of respondeat superior should be applied in a section 1981 case, reference could be made to 42 U.S.C. §1983, which rejects that principle, Monell v. Department of Social Services, 56 L.Ed.2d 611, 636-38 (1978), or to Title VII which applies it.^{5/} Second, it was the clear intent of Congress in adopting Title VII not to repeal any pre-existing rights under other statutes. Both in 1964 and in 1972 Congress rejected proposals to make Title VII the exclusive

^{5/} See, e.g., Reyes v. Matthews, 428 F.Supp. 300, 301 (D.D.C. 1976).

prohibition against employment discrimination.^{6/} In 1972 opponents of such a proposal expressly referred to the 1866 Civil Rights Act and argued that it was needed since "employees are not fully protected" by Title VII because of the restrictions written into Title VII to assure its passage.^{7/} In 1964 a Justice Department memorandum placed in the Congressional Record by Senator Clark stated "[T]itle VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State Statutes".^{8/} Thus while the in pari materia rule may be used where it would have a possibly expansive impact on section 1981, that rule cannot be relied on to read into section 1981 either the substantive^{9/} or procedural^{10/} limitations of Title VII.

6. See 118 Cong. Rec. 3964-65 (1972); 110 Cong. Rec. 13650-52 (1964); Runyon v. McCrary, 427 U.S. at 174-75; Alexander v. Gardner-Denver Co., 415 U.S. 36, 48, n.9 (1974).

^{7/} 118 Cong. Rec. 3372 (remarks of Sen. Williams), 3962 (remarks of Sen. Javits).

^{8/} 110 Cong. Rec. 7207.

^{9/} See, e.g., 42 U.S.C. §§2000e(b), 2000e-1, 2000e-2(f), 2000e-2(h), 2000e-2(i), 2000e-2(j).

^{10/} See, e.g., 42 U.S.C. §§2000e-5(c), 2000e-5(e), 2000e-5(f), 2000e-5(g).

The language of section 1 of the 1866 Civil Rights Act does not expressly limit its protections to cases of intentional discrimination. It provides that all "citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude ... shall have the same right ... to make and enforce contracts as is enjoyed by white citizens."^{11/} Grammatically the references to race and previous servitude merely explain who is included within the protection of the statute, not what rights are conferred. Cf. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 288 (1976). Section 2 of the Act, which clearly did have a particular intent requirement, referred to penalties on any person "on account of such person having at any time been held in a condition of slavery" or "by reason of his race or color", but this terminology is not used in section 1. Similarly, the phrase "because of race or color" was used in section 14

^{11/} 14 Stat. 27.

of the Freedmen's Bureau Act of 1866^{12/} to indicate an intent requirement. The broader language of section 1 of the Civil Rights Act was not, we suggest, "a mere slip of the legislative pen." Jones v. Alfred Mayer Co., 392 U.S. 409, 427 (1968). The reference to the rights actually "enjoyed" by whites, instead of a mere requirement that there be no express difference in rights, contemplates on its face equality in the practical consequences of rights. This is consistent with Senator Trumbull's assertion when introducing the bill that "[t]here is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits."^{13/}

The one undisputed goal of Congress in enacting the Civil Rights Act was "eliminating the infamous Black Codes." Jones v. Alfred Mayer Co., 392 U.S. 409, 433 (1978). The codes were ex-

^{12/} 14 Stat. 177.

^{13/} Cong. Globe, 39th Cong., 1st Sess., 474.

pressly referred to by both the House^{14/} and Senate^{15/} sponsors of the Act. In responding to President Johnson's veto message, Senator Trumbull insisted that it was these "oppressive" laws which made legislation necessary.^{16/} Congress was thoroughly familiar with the details of these Codes; they were quoted on the floor and the status of legislation in each state was the subject of repeated discussions.^{17/} Congress clearly understood that if the Civil Rights Acts were passed those Codes would be "annulled".^{18/} Accordingly the terms and nature of the Black Codes themselves are of substantial importance in determining the intent of Congress.

The Civil Rights Act guarantees blacks the right to "make ... contracts" and Congressman Thayer complained that the Black Codes "impair [freedmens'] ability to make contracts for labor

^{14/} Id. pp. 39, 40, 41 (remarks of Rep. Wilson).

^{15/} Id. pp. 474, 475 (remarks of Sen. Trumbull).

^{16/} Id. p. 1759.

^{17/} See nn. 14-16, infra; see also id. pp. 1118-19, 1123-25, 1151-53, 1159-60, 1838, 1839.

^{18/} Id. pp. 39, 40, 41, 111 (remarks of Rep. Wilson).

in such a manner as virtually to deprive them of the power of making such contracts."^{19/} None of the Black Codes, however, literally forbade blacks from making labor contracts; on the contrary, they contemplated that such contracts would be made and frequently required that they be in writing,^{20/} a practice encouraged by the Freedmen's Bureau. The provisions of the Codes with which Congress was concerned affected freedom of contract in a different manner, and were generally racially neutral on their face, though not in their effect. The provisions most repeatedly objected to by Congress were the vagrancy laws.^{21/} These statutes defined vagrants in such a broad way as to include virtually any adult black who was not gainfully employed, and provided that any person convicted of vagrancy could be punished by being bound out

^{19/} Cong. Globe, 39th Cong, 1st Sess., p. 1151.

^{20/} W. Fleming, Documentary History of Reconstruction, v.1, pp. 288 (Mississippi), 299 (South Carolina); E. McPherson, Political History of the United States of America During The Period Of Reconstruction, p. 39 (Florida).

^{21/} See Cong. Globe, 39th Cong., 1st Sess., pp. 504 (remarks of Sen. Howard), 1123, 1124 (remarks of Rep. Cook), 1151 (remarks of Rep. Thayer), 1160 (remarks of Rep. Windom).

to any person for a period of up to one year.^{22/} Of the five such laws, however, four contained no reference to race, and literally applied to whites as well as blacks. In Mississippi the general definition of vagrancy applied to everyone, but the law also deemed as vagrants freedmen, regardless of their employment, who were "found unlawfully assembling together", but even in that case whites assembling with the freedmen were also considered vagrants.^{23/}

Second in importance to the vagrancy laws were state laws regulating the terms and conditions of employment.^{24/} These provided, inter alia, that an employee's wages would be forfeited if he did not complete the term of his contract, that he could be fined by his employer for disobedience, being "absent from home without leave", or for injuries to tools and animals. No visitors

^{22/} McPherson, supra, pp. 30 (Mississippi), 33 (Georgia), 39 (Florida), 41 (Virginia), 43-44 (Louisiana).

^{23/} Fleming, supra, p. 284. In addition only black vagrants could be hired out to earn their fines. Id. p. 285.

^{24/} See Cong. Rec., 39th Cong., 1st Sess., 39 (remarks of Rep. Wilson) (provisions of Georgia regulations condemned as "degrading and arbitrary").

could be received during working hours and no livestock kept without the employer's permission.^{25/} Disobedience by an employee was a criminal offense, and the employer could have a worker whipped for "want of respect and civility to himself, his family, guests or agents".^{26/} Most states made it a crime to induce an employee away from his job, thus effectively locking him into working for his old master^{27/} for at least the term of each contract, and in South Carolina an employee could not contract with a new employer "without production of the discharge of his former master."^{28/} These onerous regulations, in the case of South Carolina, Alabama, and Louisiana, literally applied to all laborers regardless of race; in Mississippi and Florida, on the other hand, they applied only to blacks.

^{25/} See, e.g., McPherson, supra, p. 39 (Florida).

^{26/} See, e.g., Fleming, supra, p. 301 (South Carolina).

^{27/} See, e.g., McPherson, supra, pp. 31 (Mississippi), 34 (Alabama), 40 (Florida), 43 (Louisiana); Fleming, supra, pp. 287-9 (Mississippi), 302 (South Carolina).

^{28/} Fleming, supra, p. 30-2.

Third, South Carolina and Mississippi established by statute apparently harsh rules regarding the relationship of masters and apprentices, but in general these provisions applied regardless of race.^{29/}

Thus the provisions of the Black Codes which restricted the right of freedmen to contract did so in most instances in a racially neutral manner. Congress, however, had no doubt that adoption of the Civil Rights Act would be sufficient by itself to abrogate the Codes. Nothing in the legislative history suggests that Congress assumed the Codes would remain in effect unless and until it was proved at trial that they had been adopted to discriminate against blacks; indeed, under the then applicable decisions of this Court an inquiry into the motives of a legislature would have been impermissible. Fletcher v. Peck, 6 Cranch. 87, 130 (1810); Ex

^{29/} Id., pp. 282-83 (Mississippi), 297-99 (South Carolina). Mississippi, but not South Carolina, authorized local courts to apprentice out black children whose parents could not or would not support them. South Carolina, but not Mississippi, required that an artisan who needed a license to practice his trade must also obtain a license for a black, but apparently not a white, apprentice.

parte McCardle, 7 Wall. 506, 514 (1869).^{30/} To the extent that the Thirty-Ninth Congress discussed the purposes of southern legislatures, it was concerned with a continued spirit of insurrection and a desire to preserve slavery;^{31/} certainly proof of that sort of motivation is not required to establish a violation of section 1981.

The characteristic of the Black Codes which placed them squarely within the prohibitions of the Civil Rights Act, and which was the central reason for congressional action, was that "under other names and in other forms a system of involuntary servitude [was] perpetuated over this unfortunate race."^{32/} The social conditions

^{30/} This rule was adhered to as recently as Palmer v. Thompson, 403 U.S. 217, 224-25 (1971). Although Palmer indicates, and Washington v. Davis, 426 U.S. 229 (1976), holds that an inquiry into legislative motive may be necessary, and hence permissible, under the Fourteenth Amendment, that Amendment was not ratified until two years after passage of the 1866 Civil Rights Act.

^{31/} Id., pp. 1839 (remarks of Sen. Clarke), 1785 (remarks of Sen. Stewart).

^{32/} Id., p. 1124 (remarks of Rep. Cook) (Emphasis added).

extant before the adoption of the Thirteenth Amendment were "perpetuated" in two senses. First, the restrictions in fact suffered by blacks were similar if not identical to those imposed in an expressly racial manner by the old slave codes.^{33/} Second, the racially neutral provisions of the then Black Codes bore primarily on blacks because of the social and economic consequences of the recently ended discriminatory laws and economic system of the slave states. Thus Senator Clarke asserted the Codes would "virtually make serfs of the persons that the constitutional amendment made free".^{34/} Representative Thayer felt the Codes would "retain [freedmen] in a state of real servitude".^{35/} Representative Cook urged the Codes would "virtually reenslave" the blacks,^{36/} and Representative Wilson felt that under them blacks were "practically slaves".^{37/} Since Congress was con-

^{33/} Id. p. 474 (remarks of Sen. Trumbull).

^{34/} Id. p. 187.

^{35/} Id. p. 1151.

^{36/} Id. p. 1124.

^{37/} Id. p. 41.

cerned with the practical consequences of the Black Codes, it naturally regarded the vagrancy and labor regulation laws, whose harsh impact fell primarily on former slaves, as depriving them of "the same right ... to make and enforce contracts ... as is enjoyed by white citizens."

The other rights with which the Civil Rights Act was concerned were generally dealt with by the southern states, if at all, in an expressly racial manner, but these provisions were less common and of less practical importance than the labor and vagrancy portions of the Black Codes. No example was cited during the debates of a Black Code which limited the right of freedmen to sue and be parties; this clause appears to have been added because there were such restrictions in the old Slave Codes,^{38/} but the Black Codes that mention the right to sue and be sued all expressly

^{38/} Senator Sherman urged that this right be protected because a man would not "be free without the right to sue and be sued, to plead and be impleaded." Cong. Globe, 39th Cong., 1st Sess. 41.

gave that right to blacks.^{39/} No limitations appear to have existed with regard to personal property. The limitations on the ownership of real property were expressly racial, but so far as we have been able to ascertain these existed only in Mississippi^{40/} and certain localities within Louisiana.^{41/} In general state laws provided for the same criminal penalties for blacks and whites,^{42/} except that the rape of a white woman by a black man was often the subject of a heavier penalty.^{43/} Those Codes dealing with testimony by freedmen either allowed it in all

39/ McPherson, supra pp. 29 (North Carolina), 31 (Mississippi), 321 (Georgia), 33 (Alabama), 34 (South Carolina), 42 (Tennessee), 43 (Texas); Fleming, supra, p. 274 (Arkansas).

40/ McPherson, supra, p. 31.

41/ McPherson, supra, p. 279 (parish of St. Landry); W. Fleming, Documents Relating to Reconstruction, p. 31 (town of Opelousas) (hereinafter cited as "Documents").

42/ McPherson, supra, p. 33 (Georgia); Fleming, supra, pp. 289 (Mississippi), 293 (North Carolina).

43/ Fleming, supra, p. 293 (North Carolina); McPherson, supra, p. 34 (South Carolina).

cases^{44/} or in any case where a black was a party or had an interest.^{45/} On the other hand, the Black Codes contained numerous other forms of expressly racial discrimination which were not dealt with by the Civil Rights Act, including prohibitions against blacks owning guns,^{46/} co-habiting with whites,^{47/} attending white public schools,^{48/} serving on juries^{49/} and voting.^{50/} Thus while the Civil Rights Act clearly prohibited intentional racial discrimination in the areas with which it was concerned, the greatest practical impact of nullifying the Black Codes, as Congress

44/ Fleming, supra, pp. 274 (Arkansas), 275 (Alabama); McPherson, supra, p. 42 (Tennessee).

45/ McPherson, supra, p. 29 (North Carolina); Fleming, supra, pp. 287 (Mississippi), 293 (North Carolina), 311 (Texas).

46/ Fleming, supra, p. 289 (Mississippi).

47/ Id. pp. 273, 274 (Alabama), 288 (Mississippi).

48/ Id. pp. 275 (Arkansas), 277-78 (Florida), 311 (Tennessee), 312 (Texas).

49/ Id. pp. 275 (Arkansas), 311 (Tennessee).

50/ Id. p. 275 (Arkansas).

must have been aware, was the elimination of the provisions on labor and vagrancy, often racially neutral on their face, which had the effect of perpetuating the inferior status to which black workers had earlier been consigned because of their race.

This construction of the 1866 Act is confirmed by the responses to the Black Codes of the military officials in charge of the union forces then occupying the south. With the knowledge and approval of the Thirty-Ninth Congress, commanding generals annulled provisions of the Black Codes in Mississippi, Virginia, Alabama, North Carolina and South Carolina.^{51/} This action was not limited to the expressly racial provisions of those Codes; in South Carolina, for example, General Sickles' orders invalidated the racially neutral provisions of the state's laws which punished as vagrants people who could not find work, authorized corporal punishment for disobedient employees, and precluded workers from taking a new job without the approval of their

^{51/} Cong. Globe, 39th Cong., 1st Sess., pp. 39, 111, 603 (remarks of Rep. Wilson), 1123 (remarks of Rep. Cook).

former employer.^{52/} In striking down the Virginia vagrancy law, General Terry, in an explanation quoted in part by Senator Trumbull during the debates on the Civil Rights Act,^{53/} made no reference to the motives of the legislature, but considered only the fact that "[t]he ultimate effect of the statute will be to reduce the freedmen to a condition of servitude worse than that from which they have been emancipated -- a condition which will be slavery in all but its name."^{54/}

^{52/} McPherson, supra, pp. 36-37, ¶¶ IV, XIII, XVII.

^{53/} Cong. Globe, 39th Cong., 1st Sess., p. 1759.

^{54/} This is the passage quoted by Senator Trumbull. The more detailed explanation which preceded was as follows: "In many counties of this State meetings of employers have been held, and unjust and wrongful combinations have been entered into for the purpose of depressing the wages of the freedmen below the real value of their labor, far below the prices formerly paid by masters for labor performed by their slaves. By reason of these combinations wages utterly inadequate to the support of themselves and families have, in many places, become the usual and common wages of the freedmen. The effect of the statute in question will be, therefore, to compel the freedmen, under penalty of punishment as criminals, to accept and labor for the wages established by

It is thus clear that Congress did not intend that the prohibition of the 1866 Civil Rights Act be limited to instances where racial motive could be proven, but was concerned about whether the consequence of a particular law or practice was to render blacks significantly less able to enjoy the rights exercised by whites. This Court need not in this case decide all possible legal questions which might arise from this aspect of the Act. It is sufficient for the disposition of this case to hold that a practice which prevents such equal enjoyment by perpetuating past intentional discrimination is forbidden by section 1981. That was clearly the impact of the Black Codes, for their readily perceived coercive effect on blacks, and relatively minor effect on whites, derived from the drastically different social, economic and educational status of black and white workers,

54/ Cont'd.

these combinations of employers. It places them wholly in the power of their employers, and it is easy to foresee that, even where no such combination now exists, the temptation to form them offered by the statute will be too strong to be resisted, and that such inadequate wages will become the common and usual wages throughout the State." McPherson, supra, p. 42.

which was in turn rooted in a century of slavery and discrimination.

This construction of section 1981 accords with the established construction of the Fourteenth Amendment. This Court has repeatedly held that neutral state practices which perpetuate the effects of past intentional discrimination are themselves unlawful. A school board which earlier assigned students on the basis of race remains in violation of the Constitution if it adopts a policy of reassigning students each year to the school they attended previously, subject only to a transfer procedure whose burdens are so great as to lock students into their original school. Green v. School Board of New Kent County, 391 U.S. 430 (1968). A geographic assignment plan that "appears to be neutral" is unlawful if it maintains in operation "the continuing effects of past school segregation." Swann v. Charlotte-Mecklenburg Board of Ed., 402 U.S. 1, 28 (1971). So long as a past act of intentional discrimination caused the present assignment of a worker or student, the "remoteness in time" of the past intentional conduct is irrelevant to the legality of present practices which perpetuate its impact.

Keyes v. School District No. 1, 413 U.S. 189, 210-211 (1973). A state which in an earlier period refused to permit blacks to register to vote cannot thereafter adopt a "neutral" policy of prohibiting registration now by persons who failed to register during that earlier time. Lane v. Wilson, 307 U.S. 265 (1939). See also Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178-79 (1972). So long as a state practice perpetuates the effect of past discrimination the state is in violation of the Constitution, regardless of whether that practice was adopted in good faith.

The application of written tests such as those administered by petitioners will operate to differentiate among applicants not primarily, if at all, on the basis of their innate ability, but also, and perhaps solely on the basis of the education which they have received. In Gaston County v. United States, 395 U.S. 285 (1969), this Court recognized that as a practical matter "among black children compelled to endure a segregated and inferior education, fewer will achieve any given degree of literacy than will their better educated white contemporaries." 395 U.S. at 295.

Gaston County drew that inference where the examination involved tested mere literacy; the quality of an applicant's education is of far greater importance where, as here, the examination tests more complex verbal and mathematical skills. If black and Mexican-American applicants were denied equal educational opportunities while young, the "[i]mpartial administration of the ... test today would serve only to perpetuate these inequities in a different form." 395 U.S. at 297. Practices which thus perpetuated the effect of past discrimination in education would have been particularly obnoxious to the Congress which enacted the Fourteenth Amendment and the 1866 Civil Rights Act; that Congress was fully aware of the fact that prior to the Civil War the Slave Codes of most states forbade teaching slaves, and in some cases even freedmen, to read and write, and that similar prohibitions were still in effect in 1866. Brown v. Board of Education, 347 U.S. 483, 490 (1954).^{55/}

^{55/} Cong. Globe, 39th Cong., 1st Sess., pp. 39 (remarks of Rep. Wilson), 474 (remarks of Sen. Trumbull. Prior to the Civil War, teachers were actually jailed for instructing black children to read. H. Commager, Documents of American History, pp. 327-29 (7th Ed.). After the Civil War the Ku Klux Klan threatened and murdered northerners who

Petitioners' written examinations perpetuate the discriminatory effect of a century of purposeful racial segregation of California public schools. See Regents of University of California v. Bakke, 57 L.Ed.2d 750, 822 (opinion of Justices Brennan, White, Marshall and Blackmun)(1978). Soon after the first public "colored school" was opened in San Francisco for black children, California's education law was expressly amended in 1860 to authorize separate schools for "Negroes, Mongolians and Indians."^{56/} This statute was repealed in 1880,^{57/} following the closing of many of the separate black schools for reasons of economy,^{58/} but was replaced in 1885 by a new

^{55/} Cont'd.

had the effrontery to teach southern blacks. See Cong. Globe, 39th Cong., 1st Sess., p. 1834 (remarks of Rep. Lawrence); H. Swint, *The Northern Teacher in the South, 1862-1870*, pp. 94-142; W. Fleming, *Documentary History of Reconstruction*, v.2, pp. 203-206.

^{56/} 1860 Cal. Stats., c.329, §8; see also 1863 Cal. Stats., c.159, §68.

^{57/} General School Law of California, §1662 at 14 (1880).

^{58/} C. Wollenberg, *All Deliberate Speed, Segregation and Exclusion in California Schools 1855-1975*, pp. 24-26 (1976).

statute authorizing segregated schools for Chinese, and later Japanese, Mongolian and Indian children.^{59/} The state Attorney General subsequently issued an opinion that Mexican-Americans were Indians, and they were thus covered by this legislation^{60/}; despite the absence of express statutory authorization for excluding black children from white schools the systematic segregation of blacks continued.^{61/} The state segregation laws were not repealed until 1947, but despite that step, and notwithstanding this Court's decision in Brown v. Board of Education, California authorities continued to intentionally exclude black and Mexican-American children from white public schools. Within the last decade 20 major school districts in California,

^{59/} 1885 Cal. Stats., c.117, §1602 (Chinese); 1893 Cal. Stats., c.193, §1662 (Indians); 1921 Cal. Stats., c.685, §1 (Japanese).

^{60/} 22 California Department of Justice, *Opinions of the Attorney General*, Opinion 6735a (January 23, 1930), 931-32 (1930). See also J. Hendrick, *The Education of Non-Whites in California, 1849-1970*, p. 87 (1977).

^{61/} See Hendrick, supra, at 78-80, 98-100.

including Los Angeles,^{62/} have been found to be in violation of federal or state prohibitions against discrimination.^{63/} About half of all black and Mexican-American students attending public schools in California in 1970 were in districts operating such segregated schools.^{64/} The deleterious impact on minority students of this dual system, which Justice Douglas properly characterized as a "classic case of [the] de jure segregation involved in Brown v. Board of Education,"^{65/} has been conceded by state officials.^{66/}

62/ See Kelsey v. Weinberger, 498 F.2d 701, 704, n.19 (D.C. Cir. 1974); Crawford v. Board of Education, 17 Cal. 3d 280, 130 Cal. Rptr. 724, 551 P. 2d 28 (1976).

63/ See Brief Amicus Curiae for the NAACP Legal Defense and Educational Fund, Inc., in No. 76-811, Regents of University of California v. Bakke, pp. 13a-15a.

64/ Id., p. 15a.

65/ Guey Heung Lee v. Johnson, 404 U.S. 1215, 1215-16 (1971).

66/ See, e.g., Governor's Commission on the Los Angeles Riots, Violence in the City, pp. 49 et

In addition, of black men in California between the ages of 21 and 29, the age limits for eligibility to take the disputed examination, 50% were born in the south.^{67/} The intransigent refusal of southern school authorities to comply with Brown is well known; voluntary action was rare, and not until after Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969), did the federal courts achieve meaningful desegregation in a substantial number of southern school systems. Black students assigned to black schools in the south suffered not only because of segregation as such, but also because black schools provided in other ways as well an education far inferior to that afforded whites in the same states or elsewhere in the country. In the black schools there was generally a higher pupil-teacher

66/ Cont'd.

seq. (1965); California Legislative Assembly Permanent Subcommittee on Post Secondary Education, Unequal Access to College (1975). See also United States Commission on Civil Rights, Mexican-American Education Study, Reports I-VI (1971-74).

67/ U.S. Bureau of the Census, 1970 Census of Population, Series PC(2)-2A, State of Birth, p. 156.

ratio and lower per capita expenditures, the teachers were less well trained and had lower salaries, the physical facilities were frequently inferior, and in some cases the academic year was shorter.^{68/}

We think it unlikely that in adopting the 1866 Civil Rights Act forbidding state practices which perpetuate the effect of past discrimination Congress intended that the Act would not protect an ex-slave from Virginia if he moved to Georgia. Such a distinction would have had the incongruous effect of forbidding states to apply their vagrancy laws to their own natives, but permitting the states to apply those laws to former slaves from

^{68/} State by state statistics on each of these factors were set forth in the Intervenor's Statement Of Material Facts As To Which There Is No Genuine Issue in New York v. United States, No. 2419-71, D.D.C.. Judgment in favor of the intervenors in that case, which involved the applicability to certain New York counties of the Voting Rights Act of 1965, was affirmed by this Court. 419 U.S. 888 (1974). Some of these statistics are reproduced in the Motion of Plaintiffs-Intervenors To Affirm, No. 73-1740, pp. 1a-31a.

other states.^{69/} It also would have tended to discourage ex-slaves from moving away from their former masters, one of the primary goals of the Black Codes which Congress deplored. We therefore suggest that the 1866 Civil Rights Act forbids Los Angeles from using a non job-related test which perpetuates the effect of past discrimination regardless of whether that discrimination occurred in California or some other state.

^{69/} General Terry's decision to annul the Virginia vagrancy laws was premised on the fact that it would have an adverse impact on freedmen due, not to any past discrimination by Virginia, but to "wrongful combinations" by private employers to reduce wages. See n.54, supra. Congressman Windom expressed a similar concern with such private conspiracies, arguing they provided a reason for adopting the Civil Rights Act and annulling the Black Codes. Cong. Globe., 39th Cong., 1st Sess., p. 1160.

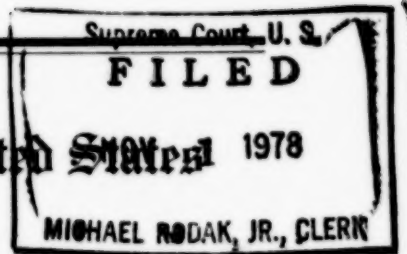
CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be affirmed.

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IN THE
Supreme Court of the United States 1978
OCTOBER TERM, 1978



No. 77-1553

COUNTY OF LOS ANGELES et al.,
v. *Petitioners,*
VAN DAVIS et al.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

 No. 77-1553

 COUNTY OF LOS ANGELES et al.,
Petitioners,

v.

 VAN DAVIS et al.,
Respondents.

 On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW AS *AMICUS CURIAE***

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963, at the request of the President of the United States, to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership today includes two former Attorneys General, ten past Presidents of the American Bar Association, a number of law school deans, and many of the nation's leading lawyers. Through its national office in Washington, D.C., and its offices in Jackson, Mississippi, and eight other cities, the Lawyers' Committee over the past fifteen years

has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

The Lawyers' Committee has been actively involved in a broad program of litigation across the country to enforce the rights of minorities and of women to freedom from discrimination in employment. The Lawyers' Committee provided representation before this Court in *Chandler v. Roudebush*, 425 U.S. 840 (1976), and has filed *amicus* briefs in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), in *Christiansburg Garment Co. v. EEOC*, 54 L.Ed.2d 648 (1978), and in *Monell v. New York City Dept. of Social Services*, 56 L.Ed.2d 611 (1978). The Lawyers' Committee has performed extensive research on the legislative history of civil rights measures enacted during the Reconstruction era, and has previously made the benefits of its research available to this Court in cases such as *Fitzpatrick*, *Monell*, *Jones v. Hildebrant*, 432 U.S. 183 (1977),¹ and *Hutto v. Finney*, 57 L.Ed.2d 522 (1978).

One of the areas of the Committee's greatest involvement has been that of employment discrimination against State and local police and fire departments. This litigation is important not just for the number of jobs it entails, but also because of the symbolic value of such employment. When members of minority groups are able to compete for these jobs and be hired, it demonstrates to society as a whole the reality of equal opportunity.

¹ After oral argument, this Court dismissed the writ of certiorari as improvidently granted, as it had become clear that Petitioner in *Jones* was not seeking damages for the injury to and killing of her son, but rather damages for deprivation of her claimed parental interest in the life of her son. 432 U.S. at 189.

The racial integration of police and fire departments is often perceived as responsible for dramatic improvements in the relations between such departments and members of minority groups, with a corresponding decline in complaints of police brutality and a corresponding improvement in the delivery of these important services.

The decision of the present case will have a strong effect upon such litigation. Many suits against local police and fire departments were brought in the period before enactment of the Equal Employment Opportunity Act of 1972, Pub.L. 92-261, 86 Stat. 103, which extended the coverage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, to State and local employment. These suits commonly challenged local testing requirements which, while unvalidated and often unrelated to the requirements of employment in police and fire departments, were routinely allowed to continue in operation despite a track record of disqualifying all but a handful of minority applicants. Many of these suits were successful, but resulted in remedial orders under which the district courts retained jurisdiction for particular purposes. Because it is rare that discriminatory purpose could be proven with respect to the adoption of a testing requirement, the relief granted in such cases may have to be dissolved if this Court were to hold that proof of discriminatory purpose is required to establish a violation of § 1981.

The decision of the present case is important for yet another reason. As the record of the instant case shows, tests for employment in police and fire departments are not given according to a regular schedule, and several years may pass between tests. The period of time between the announcement of a test and the commencement of hiring based on the test results may be only a couple of months, far less than the minimum 180-day waiting period from the filing of a Title VII charge with the

Equal Employment Opportunity Commission to the Attorney General's issuance of a Notice of Right to Sue.² If relief cannot be sought under § 1981 in such testing cases, hiring may have been completed by the time a Title VII case can be brought.

The parties have consented to the filing of this brief.

STATEMENT

The Complaint was filed on January 11, 1973, alleging racial discrimination against blacks and against Mexican-Americans by the Los Angeles County Fire Department. While the original Complaint is not included in the Appendix, the Second Amended Complaint, filed on April 16, 1973, alleged violations of Title VII and of 42 U.S.C. §§ 1981 and 1983 because of discrimination in recruitment "at least until 1969", and because of the use of written and oral tests, and of other practices, which had a racially disparate effect on blacks and on Mexican-Americans, but which had not been validated and which were not in fact job-related. App. 8-9. The parties stipulated facts establishing that the past hiring tests used by the Los Angeles County Fire Department had had a racially disparate effect on blacks and on Mexican-Americans, and stipulated that the County had never performed a validation study of these tests under the procedures set forth in the EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607. App. 21-23.

Paragraphs 22-24 of the parties' Stipulation are central to this case. They recite that a test was administered in January 1972 to 2,414 applicants, that the highest-scoring 544 applicants were selected for oral interviews, that the oral interviews commenced on January

² Sec. 706(f)(1) of the Act, 42 U.S.C. § 2000e-5(f)(1).

3, 1972, that the County decided on January 8, 1972 to discontinue this procedure and to interview substantially all of the applicants with passing scores, and that the expanded interviews began on January 20, 1973. App. 24-25. There is no explanation of record for the difference of more than a year between the two sets of interviews. Given the district court's finding that the County had used its old procedure with respect to the written test "until learning that this lawsuit was about to commence", App. 39, and given that the lawsuit actually commenced on January 11, 1973, it seems evident that most or all of the stipulated 1972 dates should actually have been dates in 1973.

The district court found that the County's use of written tests was discriminatory, and found that the City had discriminatorily failed to take the necessary affirmative steps to overcome its discriminatory reputation in the black and Mexican-American communities. It upheld the County's 5'7" height requirement for employment, and ordered affirmative hiring relief under which at least 20% of all new persons employed in firemen positions would be black, and at least 20% would be Mexican-American, until the percentage of each respective group employed as firemen should equal the percentage of that group in the general population of the County. This hiring relief was expressly based on the district court's finding that it was necessary to overcome the "presently existing effects of past discrimination", and was thus based on the County's failure to overcome the effects of its discriminatory reputation, as well as on its testing practices. App. 39-40, 42, 46.

On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's findings of discrimination, holding that Title VII standards of proof were applicable to claims raised under § 1981, reversed the district court on the 5'7" height requirement, and re-

manded the hiring relief for reconsideration in light of the reversal of the height requirement. App. 52-78. The Court of Appeals subsequently granted the County's petition for rehearing in light of the decision in *Washington v. Davis*, 426 U.S. 229 (1976), and withdrew its earlier opinion. In its new decision, the Court of Appeals again decided that Title VII standards of proof were applicable to § 1981 claims, and reached the same result with respect to the district court's findings. The remand of the hiring relief ordered by the district court was broadened, however, so that the district court could also consider the propriety of the hiring relief in light of the holding of the Court of Appeals that plaintiffs had no standing as individuals to challenge the 1969 and earlier tests, and that the failure to certify a class of past applicants meant that the earlier tests could not be challenged in the litigation. 566 F.2d 1334, 1337-38 (9th Cir., 1977). While the original decision of the Court of Appeals expressly refused to consider the County's failure to overcome its discriminatory reputation as a ground for relief, App. 57 note 6, the Court of Appeals deleted this statement in its decision on rehearing and this finding by the district court is apparently available as a ground for relief.

On June 19, 1978, the County's petition for certiorari was granted.

SUMMARY OF ARGUMENT

I.

This case presents a narrow but exceedingly important issue: whether racially motivated intent is necessary to establish a prima facie violation of 42 U.S.C. § 1981. In the first section of our brief, we suggest that this case may not be the appropriate vehicle for the resolution of that question. There is good reason to believe that, but for a clerical error in a stipulation, this case

could have been resolved under Title VII. Because the Court of Appeals has ordered the case remanded to the lower court on remedial questions, there will be ample opportunity for the court to ascertain whether a clerical error was made and to order relief under Title VII if appropriate. Accordingly, we urge the Court to dismiss the writ of certiorari as improvidently granted.

II.

(a) By its plain language, § 1981 is directed to the consequences, and not the motivation, of discriminatory employment practices. The similar language of Title VII was construed by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) to mean that disparate impact unjustified by business necessity is sufficient. The language of § 1981 is no less stringent. The same standard of proof should be applied to both statutes because they share the same remedial purposes and because Congress intended them to be read *in pari materia*.

(b) Adoption of a broad, rather than a restrictive standard of proof under § 1981 would better implement Congress' aims as reflected in the legislative history and is consonant with the accepted doctrine of the day that statutes were capable of growth and should be adapted to meet new situations.

The legislative history shows that Congress was concerned about facially neutral statutes that had a discriminatory impact on blacks. The Congress was aware of, and approved, the action taken by military commanders in South Carolina and Virginia to enjoin the enforcement of vagrancy laws enacted as part of the Black Codes to maintain the system of white supremacy in the South. Although neutral on their face, these statutes had their greatest impact on blacks who were often unable to purchase land or find work.

The Congressional discussion of intent centered on the penal provisions of § 2 of the Act. Without making any separate reference to civil liability, proponents of the bill maintained that the need for proof of intent in criminal prosecutions could be inferred from the fact that § 2 was a penal provision. No such implication can be drawn concerning civil redress.

Finally, limitation of the scope of § 1981 to willful acts of discrimination would be inconsistent with the broad practical purposes envisaged by Congress when it enacted the Civil Rights Act of 1866, 14 Stat. 27.

(c) This Court's decisions support the contention that disparate impact is the proper test to be applied in cases brought under § 1981. This is the clear import of *Washington v. Davis*, 426 U.S. 229 (1976) and was the express holding in *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948). Moreover, it is settled that § 1981 derives from the Thirteenth Amendment, and both this Court and the lower federal courts have held that intent need not be proven when suit is brought to eliminate the badges and incidents of slavery.

III.

The provisions of 42 U.S.C. § 1988 should be used to incorporate the Title VII standard of proof into § 1981 employment discrimination cases. As part of the Civil Rights Act of 1866, § 1988 was intended to augment the substantive provisions of the Act where matters unforeseen by Congress arise. In enacting Title VII, Congress has made clear that it is concerned with the consequences, and not the motivations, underlying employment practices unjustified by business necessity. Applying the Title VII standard to employment cases brought under § 1981 would carry out the intent of Congress.

ARGUMENT

I.

THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

Before turning to a discussion of the issues presented by this appeal, it is well to consider whether the Court should address those issues at all given the posture of this case. First, it may be wholly unnecessary to decide the difficult question of what standard of proof should be required in cases brought under § 1981. As Judge Wallace points out in his dissent, it appears that a clerical error in a stipulation may be responsible for the finding that Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, is unavailable to the plaintiffs as the basis for a remedy for the defendants' activities occurring after March 24, 1972. 566 F.2d at 1347 n.2.³ Since the remedy ordered by the Court is within the scope of Title VII, no practical purpose would be served by resolving the merits of the § 1981 controversy. In fact, one might expect that, even if the petitioners prevail on the merits of their argument that the Court below applied the improper standard of proof, the respondents would argue on remand that, once the record is corrected, Title VII is an independent and adequate basis upon which to predicate liability. Given this ambiguity in the record, the proper course would be to dismiss the grant of *certiorari* concerning this part of the case as improvidently granted.

³ The issue concerns whether the defendants abandoned their plan to make a discriminatory use of the 1972 examination on January 8, 1972, which was before March 24, 1972, the effective date of the Equal Employment Opportunity Act of 1972, Pub.L. 92-261, 86 Stat. 103, which extended Title VII to State and local governmental employers, or at a date subsequent to March, 1972. The record strongly suggests that the actual date was in January 1973, shortly before the filing of suit. See discussion in Statement of Facts.

Petitioners also contend that the district court exceeded its jurisdiction in its quota hiring order. The Court of Appeals rejected this argument on the ground that such relief would have been proper under Title VII and that the court's remedial power under Section 1981 is at least as broad. 566 F.2d at 1342-43. The court remanded this aspect of the case, however, to allow the district court to reconsider its hiring order in light of the holding of the Court of Appeals that the 5'7" height requirement for employment was invalid, and in light of the Court of Appeals' holding that respondents "lacked standing to challenge defendants' use of the 1969 examination." 566 F.2d at 1343. On remand, the district court has the power to continue the existing order, to strengthen or weaken it, or to deny affirmative hiring relief altogether, in light of the decision of the Court of Appeals on standing.

Because the present status of the hiring order is uncertain, because it may well be that the district court on remand will determine that any relief granted may be entered under Title VII as well as under Section 1981, and because the remedial issues may be altered greatly by an expansion of the class to include past applicants, it is unnecessary to confront the remedial issues at this time. Dismissal of the writ of *certiorari* as improvidently granted would conserve judicial resources and obviate the need for a ruling on important questions which appears to be unnecessary to the resolution of this case.

⁴ This holding was based on the district court's failure to certify a class of past applicants. 566 F.2d at 1337. If the district court expands the class definition on remand, the remedial issues would be cast in an entirely different light. The district court's receipt of evidence of discrimination from earlier administrations of the test suggests that it thought the rights of past applicants were included in the case, and nothing of record suggests that their omission from the class definition was advertent. Now that the Court of Appeals has emphasized the consequences of the omission, the district court may choose to cure the omission rather than to cancel the remedy.

**THE COURT OF APPEALS PROPERLY HELD THAT
A RACIALLY DISPROPORTIONATE IMPACT ALONE
IS SUFFICIENT TO ESTABLISH A VIOLATION OF
42 U.S.C. § 1981**

In *Washington v. Davis*, 426 U.S. 229 (1976), the Court held that proof of discriminatory purpose or intent is required to establish a constitutional violation under the equal protection guarantees of the Fifth and Fourteenth Amendments. 426 U.S. at 239-45. But in the course of its opinion, the Court made equally clear that Congress may predicate statutory liability for discrimination on proof of racially disproportionate impact alone. 426 U.S. at 246-48. Cf. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *Amicus* believes that the statutory language of 42 U.S.C. § 1981, its legislative history, the case law, and underlying public policy considerations require the conclusion that racial animus need not be proven in order to establish a *prima facie* case.

**(a) The Statutory Language of 42 U.S.C. § 1981 Compels
the Conclusion That Proof of Disproportionate Racial
Impact or Effect Is Sufficient to Enable a Plaintiff
to Establish a *Prima Facie* Case.**

Resolution of the question of what standard of proof should be required in an employment discrimination suit under § 1981 is aided by the decisions of this Court construing the language of Title VII. That statute was enacted "to ensure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).⁵ In *Griggs*, this Court found that "Congress

⁵ Title VII provides in pertinent part:

Sec. 703(a) It shall be an unlawful employment practice for an employer—

* * * *

(2) to limit, segregate, or classify his employees in any way

directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation", and that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432 (emphasis in original). This, the Court held, was the inexorable meaning of the language chosen by Congress:

The objective of Congress in the enactment of title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. *Id.* at 429-30.

The language of § 1981 is no less rigorous than Title VII in its protection in the same right of all persons "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, . . ." 42 U.S.C. § 1981.⁶

which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 78 Stat. 255, 42 USC § 2000e-2.

* * * *

Sec. 706(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . the court may enjoin the respondent . . . and order such affirmative action as may be appropriate, which may include . . . hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate. . . .

42 U.S.C. §§ 2000e-2(a), 2000e-5(g).

⁶ The full text of 42 U.S.C. § 1981 is:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the

It was originally designed to uproot the institution of slavery and to eradicate its badges and incidents. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-37 (1968); *Tillman v. Wheaton-Haven Recreation Ass'n.*, 410 U.S. 431, 439 (1973). It was to ensure that all persons, white or black, would be afforded equal opportunities to secure those rights which the framers deemed fundamental to a civilized society, and which they enumerated in the statute. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). It is the *condition* of having lesser contractual rights and opportunities than those "enjoyed by white citizens" which demonstrates a violation of the statute.

Title VII and § 1981 "augment each other", although they are not precisely coextensive in their coverage. *Johnson v. Railway Express Agency*, 421 U.S. 454, 460, 461 (1975). While Congress intended these administrative and judicial remedies to operate independently of one another, they share a common goal. There is nothing in the language of § 1981 that would require, or justify, a greater measure of proof in making a *prima facie* case than is required under Title VII. In fact, proof under § 1981 should be less burdensome because it lacks the phrase "because of race" which is contained in Title VII.⁷

full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

⁷ See footnote 5. It could be argued that the phrase "because of race" implies a casual relationship between motivation and the resultant discrimination. In *Griggs*, this Court made no mention of this phrase. Section 1981 contains no such language and flatly states that all persons shall be protected in the rights enumerated in the statute to the same extent as white citizens.

It would be anomalous to hold that Title VII does not require proof of intent despite the statutory requirement that respondents have intentionally engaged in an unlawful employment practice as

In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court held that § 1 of the Civil Rights Act of 1866 was "cast in sweeping terms", *Id.* at 422, and that it should be given a "sweep as broad as its language". *Id.* at 437. Implementation of this principle requires the conclusion that, by its terms, § 1981 does not require proof of discriminatory intent.

In addition to the plain language of the statute there are substantial policy reasons that would support application of the disparate-impact test in actions brought under § 1981. As we develop more extensively hereinafter, it is clear from the legislative history that § 1981 was intended to give practical force and effect to the mandate of the Thirteenth Amendment to eradicate the badges and incidents of slavery. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 422-37. The trend of this Court's decisions has been to broaden the reach of the Thirteenth Amendment, as it did in *Jones*, by holding that racial discrimination in the sale of real estate is a badge or incident of slavery, and to accord the Reconstruction Civil Rights statutes an expansive interpretation. *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971). See Note, The Expanding Scope of Section 1981: Assault on Private Discrimination and a Cloud on Affirmative Action, 90 Harv. L. Rev. 412 (1976); Kohl, The Civil Rights Act of 1866, Its Hour Came Round at Last: *Jones v. Alfred H. Mayer Co.*, 55 Va. L. Rev. 272 (1969).⁸ Even if the Reconstruction Congress did not

a condition of relief, and to hold that § 1981 does require proof of discriminatory purpose despite the effects-oriented language of the statute.

⁸ Implicit in *Griggs v. Duke Power Co.*, *supra*, is the fact that poor performance by blacks on standardized intelligence tests and the low percentage of blacks with high school diplomas "are linked to slavery and its pernicious after-effects on the educational opportunities available to blacks." Note, Racially Disproportionate Impact of Facially Neutral Practices—What Approach Under 42 U.S.C. Sec-

anticipate the form that badges and incidents of slavery would take in modern times, the Court should adopt a rule of proof that will effectuate the underlying intention to eradicate the incidents of slavery. Cf. *Browder v. United States*, 312 U.S. 335 (1941); see the discussion *infra*.

As one commentator has argued:

[U]se of the disproportionate impact theory under sections 1981 and 1982 is supported by three related considerations. First, civil rights legislation is now recognized by the courts as being remedial in nature and thus deserving of liberal interpretation to realize the beneficent (sic) purposes underlying the statutes. Second, Title VII and sections 1981 and 1982 should be interpreted in *pari materia* because they have similar remedial purposes. The courts have generally given these statutes parallel interpretations in matters of substance. And finally, Congress has impliedly consented to the reading of section 1981 in *pari materia* with Title VII by refusing to amend Title VII in 1972 so as to make it the exclusive remedy for employment discrimination.

The use of the disproportionate impact standard for sections 1981 and 1982 is permissible under the broad language of those statutes and is desirable as a method of effectuating the underlying congressional purpose.

Note, *supra*, 1977 Duke L. J. at 1286-87. (Footnotes omitted.)⁹

tion 1981 and 1982?, 1977 Duke L.J. 1267, 1286. The standard of proof which the Court announced in *Griggs* was designed to effectuate Congress' intent that "artificial, arbitrary and unnecessary barriers to employment" be eliminated. 401 U.S. at 431. See *Gaston County v. United States*, 395 U.S. 285 (1969), cited by this Court in *Griggs*.

⁹ With respect to Congress' discussion of the relationship between Title VII and § 1981, see text, *infra*, at 40-41.

(b) The Legislative History of the Civil Rights Act of 1866 Supports A Broad Reading, Unrestricted By An Intent Requirement, of the Civil Provisions of the Statute

It would be unrealistic to examine the legislative history of the Civil Rights Act of 1866 for discussions of disparate-impact analysis such as the discussion of this Court in *Griggs*.¹⁰ There are strong indications in the legislative history of the 1866 Act, however, that a broad reading of the statute so as to prohibit both disparate-impact and intentional discrimination is more in harmony with the intent of Congress than a restriction of its reach to acts of purposeful discrimination.

Such indications are of particular importance in construing statutes of this period because a contemporaneous doctrine of statutory construction held that the words and original application of a statute did not necessarily limit its effect. Like a judicial precedent, a statute was considered as being to some extent capable of growth under the demands of a changed situation, so that it would continue to serve its original purposes. This Court recognized this doctrine of "the equity of the statute" in *United States v. Freeman*, 44 U.S. 556, 565 (1845), and cautioned that there should not be "an equitable construction of statutes beyond the just application of adjudicated cases." In *Stewart v. Kahn*, 78 U.S. 493, 504 (1871), this Court held that "severe and literal" constructions should be avoided, and continued: "A case may be within the meaning of a statute and not within its letter, and within its letter and not within its meaning. The intention of the law maker constitutes the law." See also Landis, "Statutes and the Sources of Law", *Harvard Legal Essays* 213 (1934). Whatever

¹⁰ E.g., Note, *supra*, 1977 Duke L.J. at 1280.

may be the current force of this doctrine,¹¹ it was undeniably accepted in the 1860's, and the 39th Congress must be considered—absent persuasive evidence in the legislative history of the 1866 Act to the contrary—to have framed the Act under the assumption that its interpretation would not be limited to the specific situations then facing Congress, but was capable of growth to meet new situations. If there is no adequate direct evidence as to an intent requirement, therefore, the inquiry must shift to the identification of the primary purpose of Congress. If the primary purpose was to secure a practical result, this would indicate an intention that the reach of the statute be capable of growth sufficient to accomplish that result. If the congressional purpose was only to ensure facial neutrality in the actions of State and local government officials, while banning the more egregious private actions as well, this limited view of the statute would support petitioners.

(1) Direct Evidence That Congress Did Not Intend to Limit the Civil Provisions of the Statute By an Intent Requirement

The strongest indication that Congress considered and accepted a disparate-impact standard arose in the course of debate on the effect of the statute on the "Black Codes" adopted by Southern legislatures after the end of the war, and the desire of Congress to enact into positive law in the statute the military orders disapproving those codes. Many provisions of the Black Codes were not discriminatory on their face; some went so far

¹¹ In his dissenting opinion in *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 390 (1953), Justice Frankfurter stated:

Statutes, even as decisions, are not to be deemed self-enclosed instances; they are to be regarded as starting points of reasoning, as means for securing coherence and for effectuating purpose.

as to guarantee blacks the right to own property.¹² The evils Congress sought to redress in relation to these codes were of two kinds: the explicit racial discrimination in some provisions of the codes, and also the racially disparate operation of certain harsh but facially neutral provisions such as the vagrancy and apprenticeship laws. These latter provisions applied to blacks and whites alike,¹³ but harmed blacks to a much greater extent than whites because of the private actions of whites in refusing to sell land to blacks or to employ blacks at a fair wage.¹⁴

The provisions of the Virginia vagrancy law are an excellent case in point. On its face, the statute applied to both blacks and whites, and defined as vagrants the members of either race who were beggars, or who had no visible means of support, or who, "not having wherewith to maintain themselves and their families, . . . live idly and without employment, and refuse to work for the

¹² Kohl, *supra*, 55 Va.L.Rev. at 276-78. The Black Codes were collected in 1 *Senate Executive Documents* (39th Cong., 2nd Sess.) (1886) No. 6 at 170-230. See note 15 *infra*.

¹³ 1 *Senate Executive Documents, supra*, No. 6 at 170-71 (Alabama, Act of December 15, 1865 concerning vagrants or vagrancy); at 180-81 (Georgia, Act of March 17, 1866 in relation to apprentices); at 181-83 (Louisiana, Act regulating labor contracts for agricultural pursuits, not then signed by the Governor); at 184-85 (Louisiana, Act of December 20, 1865 for the punishment of vagrancy); at 186 (Louisiana, Act of December 21, 1865 in relation to apprentices and indentured servants); at 218-19 (South Carolina, §§ 95-99 of the Act of December 21, 1865, relating to vagrancy); and at 229-30 (Virginia, Act of January 15, 1866 providing for the punishment of vagrants). As will be seen hereafter, the provisions of the Black Codes were discussed frequently in the debates on the 1866 Act.

¹⁴ Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. (1866), part II at 55, 83, 235-36, part III at 9, 22, 36, 71, and part IV at 56, 69, 82 and 117; Report of General Carl Schurz (December 1865), 1 *Senate Executive Documents*, (39th Cong., 1st Sess., 1865) No. 2 at 22, 24-25, 82; Kohl, *supra*, 55 Va.L.Rev. at 279-83.

usual and common wages given to other laborers, in the like work, in the place where they then are." Vagrants of both races were subject to arrest and to a warrant ordering them "to be employed in labor for any term not exceeding three months . . . for the best wages that can be procured . . . to be applied . . . for the use of the vagrant or his family."¹⁵ Nine days after its enactment,

¹⁵ The complete provisions of the Virginia Act of January 15, 1866, "An Act Providing for the Punishment of Vagrants", are:

1. *Be it enacted by the general assembly*, That the overseers of the poor, or other officers having charge of the poor, or the special county police, or the police of any corporation, or any one or more of such persons, shall be, and are hereby, empowered and required, on discovering any vagrant or vagrants within their respective counties or corporations, to make information thereof to any justice of the peace of their county or corporation, and to require a warrant for apprehending such vagrant or vagrants, to be brought before him or some other justice; and if upon due examination it shall appear that the person or persons are within the true description of a vagrant, as hereinafter mentioned, such justice shall, by warrant, order such vagrant or vagrants to be employed in labor for any term not exceeding three months, and by any constable of such county or corporation to be hired out for the best wages that can be procured; to be applied, except as hereafter provided, for the use of the vagrant or his family, as ordered by the justice. And if any such vagrant or vagrants shall, during such time of service, without sufficient cause, run away from the person so employing him or them, he or they shall be apprehended on the warrant of a justice, and returned to the custody of such hirer, who shall have, free of any further hire, the services of such vagrant for one month in addition to the original term of hiring; and said employer shall then have the power, if authorized by the justice, to work said vagrant confined with ball and chain; or should said hirer decline again to receive said vagrant, then said vagrant shall be taken by the officer, upon the order of the justice, to the poor or work house, if there be any such in said county or corporation; or, if authorized by the justice, to work him confined with ball and chain for the period for which he would have had to serve his late employer, had he consented to receive him again; or should there be, when said runaway vagrant is apprehended, any public work going on in said county or corporation, then said vagrant, upon the order of a justice, shall be delivered over by said officer to the superintendent of said public work, who shall, for the like last-mentioned period,

work said vagrant on said public works, confined with ball and chain, if so authorized by said justice. But if there be no poor or work house in said county or corporation, and no public work then in progress therein, then, in that event, said justice may cause said vagrant to be delivered to any person who will take charge of him, said person to have his services free of charge, except maintenance, for a like last-mentioned period; and said person so receiving said vagrant is hereby empowered, if authorized by the justice, to work said vagrant with ball and chain; or should no such person be found, then said vagrant is to be committed to the county jail, there to be confined for the like period and fed on bread and water. But the persons described as the fifth class of vagrants in the second section of this act, may be arrested without warrant by the special county or corporation police, and when so arrested shall be taken before a justice, who shall proceed to dispose of them in the mode prescribed in this section, or may at once direct them to be committed to prison for a period not exceeding three months, to be kept in close confinement and fed on bread and water.

2. The following described persons shall be liable to the penalties imposed by law upon vagrants:

First. All persons who shall unlawfully return into any county or corporation whence they have been legally removed.

Second. All person not having wherewith to maintain themselves and their families, who live idly and without employment, and refuse to work for the usual and common wages given to other laborers, in the like work, in the place where they then are.

Third. All persons who shall refuse to perform the work allotted to them by the overseers of the poor, as aforesaid.

Fourth. All persons going about from door to door, or placing themselves in streets, highways, or other roads to beg alms; and all other persons wandering abroad and begging, unless disabled or incapable of labor.

Fifth. All persons who shall come from any place without this commonwealth to any place within it, and shall be found loitering and residing therein, and shall follow no trade, labor, occupation or business, and have no visible means of subsistence, and give no reasonable account of themselves or their business in such place.

3. All costs and expenses incurred shall be paid out of the hire of such vagrant, if sufficient; and if not sufficient, the deficiency shall be paid by the county or corporation.

4. This act shall be in force from its passage.

Passed January 15, 1866.

I *Senate Executive Documents* (39th Cong., 2nd Sess., 1866), *supra*, No. 6 at 229-30.

Major General A. H. Terry, the Commander of the Department of Virginia, issued an order prohibiting the enforcement of this vagrancy law because, regardless of the intent of the legislature, private actions would make its actual operation more onerous for blacks than for whites. General Terry's order reads in pertinent part:

In many counties of this State meetings of employers have been held, and unjust and wrongful combinations have been entered into for the purpose of depressing the wages of the freedmen below the real value of their labor, far below the prices formerly paid to masters for labor performed by their slaves. By reason of these combinations wages utterly inadequate to the support of themselves and families have, in many places, become the usual and common wages of the freedmen. The effect of the statute in question will be, therefore, to compel the freedmen, under penalty of punishment as criminals, to accept and labor for the wages established by these combinations of employers. It places them wholly in the power of their employers, and it is easy to foresee that, even where no such combination now exists, the temptation to form them offered by the statute will be too strong to be resisted, and that such inadequate wages will become the common and usual wages throughout the State. The ultimate effect of the statute will be to reduce the freedmen to a condition of servitude worse than that from which they have been emancipated—A condition which will be slavery in all but its name.

It is therefore ordered that no magistrate, civil officer or other person shall in any way or manner apply or attempt to apply the provisions of said statute to any colored person in this department.

By command of Major General A. H. Terry,
Ed. W. Smith, *Assistant Adjutant General*.

McPherson, *The Political History of the United States of America During the Period of Reconstruction* (1871)

at 42. The President refused to disapprove this Order. *Id.*

This was not an isolated occurrence. In South Carolina, Major General D. E. Sickles ordered on January 17, 1866 that the only vagrancy laws that could be enforced in the State were those "applicable to free white persons", and ordered further that even these laws, made racially neutral by his order, "shall not be considered applicable to persons who are without employment, if they shall prove that they have been unable to obtain employment, after diligent efforts to do so." Order of January 17, 1866, ¶ XIII, McPherson, *supra* at 37. Orders quashing State laws were also issued by General Swayne in Alabama and by General Thomas in Mississippi.

In the debates on the 1866 Act, these Orders were frequently discussed and approved. Several members of Congress stated their view that the provisions of these Orders would be continued by the provisions of the Act, and would thus both survive the end of military government in the South and be made applicable nationally. Senator Wilson described the facially neutral Virginia vagrancy law as having been "used to make slaves of men whom we have made free," thanked General Terry for his order, and described the State laws set aside by military order as "nearly as iniquitous as the old slave codes that darkened the legislation of other days." He thought passage of the civil rights bill was required in order to bar such State laws forever. Cong. Globe, 39th Cong., 1st Sess., [hereafter, "Cong. Globe"] at 603. In the debate on initial passage, Senator Trumbull, the manager of the bill, stated that one of its purposes was to destroy all the discriminations of the Black Codes. Cong. Globe at 474. In the debate on passage of the bill over the President's veto, Senator Trumbull quoted General Terry's statement that the Virginia vagrancy law would

have the effect of "[reducing] the freedmen to a condition of servitude worse than that from which they have been emancipated", and cited the orders issued by Generals Terry and Sickles as demonstrating the existence of the evils—denied by the President—that the bill was intended to redress. Cong. Globe at 1759, 1760.

The House debate was equally clear. Rep. Cook cited the vagrancy laws and the orders of Generals Thomas, Swayne, Sickles and Terry, and continued:

The time when these men can be protected by the military power will cease. Gentlemen are insisting that the time has come when these States should be represented in Congress and restored to their original position in the Union; and the last part of the speech of the gentleman from New Jersey [Mr. ROGERS] was devoted to a denunciation of gentlemen on this side of the House because they do not believe the time had fully come. Suppose that proposition is agreed to, and these States are restored to all the rights of sovereign States within this Union, and they carry out the same spirit they have already manifested toward these freedmen. Then the question is, shall we leave the men who have been loyal during this struggle, have fought on our side, and who have aided to carry the banner of the Republic in triumph through this terrible rebellion; shall we leave them to the operation of laws denounced as tyrannical by the military powers and as practically reducing these men to the condition of slavery?

It is idle to say these men will be protected by the States. The sufficient and conclusive answer to that position I submit is, that those States have already passed laws which would now virtually reenslave them. . . .

. . . The question is, shall we leave these men in this condition? It is idle to say we are not leaving

them to a system of slavery. If it had not been for the acts of the military commanders, had not the laws which have already been enacted by the Legislatures of the rebel States been set aside, the negroes would all have been slaves now under the operation of their vagrant acts or other laws.

I believe that this bill is a proper remedy for these evils. . . .

Cong. Globe at 1124. Rep. Thayer cited the Black Codes, and the military orders prohibiting their enforcement in Mississippi, Alabama, South Carolina, and Virginia, as demonstrating that the Thirteenth Amendment would be "of no force or effect whatever" if the bill were not enacted. Cong. Globe at 1153. Rep. Windom endorsed General Terry's order setting aside the Virginia vagrancy law, and said that the bill would accomplish the same end:

I believe, sir, that the entire party on the other side of this Chamber indorse fully the policy of the President of the United States, who has found it necessary through his general in Virginia to override one of the laws passed by that State affecting the negro. I ask, then how they can consistently indorse that policy and at the same time declare a law of Congress is unconstitutional which does the same thing?

. . . I ask if it is consistent to claim this bill as unconstitutional when gentlemen indorse the President of the United States, who overrides the laws of a State in time of peace by military order? I indorse the President in setting aside those iniquitous laws of Virginia, and I believe this bill is constitutional.

Cong. Globe at 1158. Rep. Broomall took the same position. Cong. Globe at 1263.

If Congress or the military had wanted to restrict their actions to purposeful discrimination, they could have stopped with outlawing the private combinations of employers that caused the vagrancy laws to bear more heavily on blacks than on whites. Both Congress and the military understood that they were going further, however, and prohibited the enforcement of these facially neutral laws.

Yet a further indication of the intent of Congress is provided by the discussion in debate on the requirement of intent for crimes. This Court has previously held that the scope of § 2 of the Civil Rights Act of 1866, 14 Stat. 27¹⁶—the penal enforcement provision—is substantially narrower than the scope of § 1. *Jones v. Alfred H. Mayer Co.*, *supra*, 392 U.S. at 425 note 33. It is now settled that § 1 was intended to provide a civil remedy, *Jones, supra*; *Runyon v. McCrary*, 427 U.S. 160 (1976), and it was equally clear at the time.¹⁷ Congress debated the question whether the statute required a showing of

¹⁶ Sec. 2 of the Civil Rights Act of 1866 has evolved into 18 U.S.C. § 242. *Jones, supra*, 392 U.S. at 424 note 32.

¹⁷ Sec. 3 of the Act, 14 Stat. 27, clearly contemplated that civil suits be brought in State courts to enforce the rights granted by the Act—no grant of general Federal-question jurisdiction having yet been made to U.S. District and Circuit Courts—and provided jurisdiction in the U.S. Circuit Courts where such rights could not be enforced in State or local courts. The earliest application of this right of civil enforcement which *amicus* has been able to discover was in *In re Turner*, Fed.Cas.No. 14,247 (Cir.Ct., D.Md., 1867). There, Chief Justice Chase, sitting as Circuit Justice, ordered the discharge, on a writ of habeas corpus, of a black child who had been indentured as an apprentice under the terms of a Maryland law which did not provide the same terms of indenture for black apprentices as a different law provided for whites.

In the debate, Senator Hendricks objected that the bill would create a civil remedy for damages, Cong. Globe at 601, and Senator Cowan objected that § 1 would enable the U.S. courts to expand their jurisdiction. Cong. Globe at 1782-83. No one disagreed with these propositions. See also the remarks of Rep. Wilson, *infra* note 19.

intent, but debated this question only in reference to the narrow penal provisions of § 2. The debate was occasioned by the claim of opponents of the bill that § 2 would authorize the arrest of a State judge for following in good faith the provisions of a State constitution or of State laws which were subsequently found to be inconsistent with the bill.¹⁸ The proponents of the legislation responded by stating that the requirement of unlawful intent could be inferred from the fact that § 2 was a penal provision, and that there was therefore no need to add an intent requirement to the penal provisions of the statute.¹⁹ If any express provision of the statute had been considered by its proponents to require intent, they would surely have pointed it out rather than rely on an argument by implication, when the argument relied on would clearly be inapplicable to any provision but § 2.

¹⁸ *E.g.*, Cong. Globe at 475 (remarks of Senator Cowan).

¹⁹ "[I]t requires a union of act and intention to commit a crime." Cong. Globe at 475 (remarks of Senator Trumbull); "I suppose the essence of all crimes consists in the intention, the purpose. In the trial of criminal cases, we inquire into the *animus* with which the act was done by the accused . . ." Cong. Globe at 502 (Discussion of culpability for treason) (remarks of Senator Howard); "Sir, what is a crime? It is a violation of some public law, to constitute which there must be an act and a vicious will in doing the act . . . and a judge who acted innocently, and not viciously or oppressively, would never be convicted under this act." Cong. Globe at 1758 (remarks of Senator Trumbull). Rep. Wilson stated in the House that "there are two legal modes of meeting any and every willful deprivation of these rights: one by action for damages at common law in the courts, which, however, will not lie against judicial officers; and the other by making it a penal offense, as the second section of this bill does . . ." Cong. Globe at 1836. Nothing in his remarks indicates that he intended to limit civil remedies under the statute to cases of willful violations, or that he ever addressed the precise reach of the civil provisions of the bill, as distinct from the criminal provisions. No other Representative or Senator discussed a limitation of the civil provisions in a manner corresponding to the limitation of the criminal provisions.

(2) *Indirect Evidence That Congress Did Not Intend to Limit the Civil Provisions of the Statute by an Intent Requirement*

There is strong evidence that the framers of the 1866 Act wanted the rights they declared to be capable of growth, so as to continue to accomplish their purposes under the demands of different situations. Senator Trumbull openly admitted that he did not know the exact dividing line between slavery and the liberty protected by the Thirteenth Amendment, but that he wanted to give the greatest possible practical effect to the policy declared in the Thirteenth Amendment:

Has Congress authority to give practical effect to the great declaration that slavery shall not exist in the United States? If it has not, then nothing has been accomplished by the adoption of the constitutional amendment. In my judgment, Congress has this authority. It is difficult, perhaps, to define accurately what slavery is and what liberty is. . . .

Cong. Globe at 474. He went on to state that "it is perhaps difficult to draw the precise line, to say where freedom ceases and slavery begins," but that the Black Codes passed that dividing line wherever it was. Cong. Globe at 475. Time and again, the bill's proponents stressed that their aim was "practical", geared to a particular result. Senator Trumbull stated that the bill would secure "freedom in fact". Cong. Globe at 476. Rep. Thayer stated that the bill was to give the Thirteenth Amendment:

. . . practical effect and force. It is to prevent that great measure from remaining a dead letter upon the constitutional page of this country. It is to carry to its legitimate and just result the great humane revolution to which I have referred. . . . The practical question now to be decided is whether they shall be in fact freemen. It is whether they shall have

the benefit of this great charter of liberty given to them by the American people.

* * *

For one, sir, I thought when I voted for the amendment to abolish slavery that I was aiding to give real freedom to the men who had so long been groaning in bondage. I did not suppose that I was offering them a mere paper guarantee. . . .

Cong. Globe at 1151. He continued:

The bill under consideration is intended only to carry into practical effect the amendment of the Constitution. Its object is to declare not only that slavery shall be abolished upon the pages of your Constitution, but that it shall be abolished in fact and in deed; not only that that feature of slavery shall be abolished which permitted the purchase and sale of men, of women and of little children as slaves, but that all features of slavery which are oppressive in their character, which extinguish the rights of free citizens, and which unlawfully control their liberty, shall be abolished and destroyed forever.

To put any other construction upon this great amendment of the Constitution is to deprive it of its vital force, of its effective value. It is to cheat the world by sounding phrases; and while you pretend to give liberty to those who were in bondage, to leave them in reality in a condition of modified slavery, subject to the old injustice and the old tyranny which characterized their former unhappy condition.

Cong. Globe at 1152.

Rep. Windom stated that the civil rights bill would "give practical effect to the principles of the Declaration of Independence," and stated that:

It merely provides safeguards to shield them from wrong and outrage, and to protect them in the enjoyment of that lowest right of human nature, the

right to exist. Its object is to secure to a poor, weak class of laborers the right to make contracts for their labor, the power to enforce the payment of their wages, and the means of holding and enjoying the proceeds of their toil.

Who can deny them this? To do so would be to repudiate utterly the pledges we made in the day of our sore trial, and would justly merit the scorn and contempt of mankind. We know, and the whole world knows, that when in the hour of our extremity we called upon the black race to aid us, we promised them not liberty only, but all that that word liberty implies. . . .

Cong. Globe at 1159.

To restrict the scope of § 1981 to purposeful acts of discrimination would be simply inconsistent with the broad practical purposes of Congress in enacting the 1866 Act. An intent requirement can readily be harmonized with the goal of ensuring the neutrality of government processes, towards which the Fourteenth Amendment's equal protection clause was later directed. However, the Civil Rights Act of 1866 was directed towards achieving the *practical result* of equality, not towards ensuring a neutral process. The purpose of the Act would be thwarted, and the equity of the statute violated, if it were construed in the manner suggested by petitioners.

(c) Judicial Precedent Supports *Amicus'* Position That Discriminatory Intent Need Not Be Proven to Establish a Statutory Violation Under 42 U.S.C. § 1981.

(1) *This Court's Cases Applying § 1981 Do Not Require Intent to Be Proven*

A holding that proof of racial motivation is not required to establish a *prima facie* case under § 1981 would be consistent with this Court's previous interpretations of § 1981. In fact, *amicus* believes that Part III

of the opinion in *Washington v. Davis* is dispositive of this question.²⁰ In *Washington* the Court noted that the defendants in the district court "appear not to have disputed that under the statutes and regulations governing their conduct standards similar to those obtaining under Title VII had to be satisfied." 426 U.S. at 249 (footnote omitted). Part II of the Court's opinion was based on the fact that racially discriminatory purpose had not been shown and that therefore, under constitutional standards, the defendants were not required to show that the test there involved—"Test 21"—was job related. Accordingly, there would have been no need for the Court to go on—as it did in Part III of its opinion—to reach the question whether Test 21 had been shown to be job related, unless it were assumed—as the Court obviously did assume—that discriminatory purpose need not be shown under the statutes, including § 1981, there involved. *League of United Latin American Citizens v. City of Santa Ana*, 410 F.Supp. 873 (C.D. Cal. 1976).²¹

²⁰ The respondents' complaint in *Washington v. Davis* alleged violations of the Fifth Amendment, § 1981 and D.C. Code § 1-320. 426 U.S. at 233. Respondents moved for summary judgment solely on the constitutional claim. The petitioners and the Federal parties filed cross-motions for summary judgment "asserting that respondents were entitled to relief on neither constitutional nor statutory grounds." 426 U.S. at 234 (footnote omitted). In Part III of its opinion, this Court held "that the Court of Appeals should have affirmed the judgment of the District Court granting the motions for summary judgment filed by petitioners and the Federal parties. Respondents were entitled to relief on neither constitutional nor statutory grounds." 426 U.S. at 248. The petitioners consistently maintained that they had complied with "all applicable statutory as well as constitutional standards." 426 U.S. at 234 n. 4 and 249. Thus the holding of Part III must relate to § 1981 and D.C. Code § 1-320. See 426 U.S. at 255 (Stevens, J., concurring).

²¹ The petitioners represent in their brief that in *Jones v. Alfred H. Mayer Co.*, *supra*, this Court held that discriminatory intent is required under 42 U.S.C. § 1982. Brief at 20-22. Arguing from this premise, they contend that § 1981 must be construed accordingly because of the historical relationship between the two sections. But

This reading of *Washington v. Davis* is clearly consistent with this Court's use of the disparate-impact test in *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948). There, the Court applied § 16 of the Enforcement Act of 1870, now codified as § 1981, to "protect 'all persons' against state legislation bearing unequally upon them either because of alienage or color." 334 U.S. at 419-20. In reaching its decision, the Court found it unnecessary to resolve the question whether the legislation in question—a California statute barring aliens "ineligible for citizenship" from engaging in commercial fishing in California's coastal waters—was a legitimate fish conservation measure, or was an anti-Japanese measure motivated by racial antagonism. 334 U.S. at 418-19.²² The Court held that, regardless of motive, the combined effects of § 1981 and the Fourteenth Amendment "embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." *Id.* at 420.

In *Takahashi*, the Court made reference to the fact that § 1981 rests "in part" on the Fourteenth Amendment. *Id.* at 420. Subsequent decisions re-affirmed that the Congress, in re-enacting the Civil Rights Act in 1870, did not renounce its Thirteenth Amendment

Jones does not stand for the proposition asserted. The Court's use of the phrase "racially motivated deprivation" occurs only in the context of characterizing the arguments advanced by the parties—arguments that were concerned solely with the question whether § 1982 reaches purely private discrimination. 392 U.S. at 421-22, 425-26. The Court's discussion is descriptive of these arguments only, and does not even rise to the level of *dicta*.

²² Thus, *Takahashi* involves a principle different from that in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), cited by the Court in *Washington v. Davis*, 426 U.S. at 241. *Takahashi* was not a case in which intent could be inferred from discriminatory application of a statute otherwise neutral on its face. *Takahashi*, 334 U.S. at 418 (citing *Yick Wo*).

origins. Although the petitioners seek to trivialize the inquiry into the origins of § 1981 as an "interesting excursion into the realm of legislative genealogy" (Brief at 18), *amicus* believes that it is of great importance in determining the standard of proof in § 1981 cases. The following discussion shows that the Thirteenth Amendment was enacted specifically to eliminate the "badges and incidents" of slavery. Unlike constitutional violations under the Fourteenth Amendment, motivation is irrelevant when it comes to the destruction of the institution of slavery and its lingering manifestations.

(2) Racially Discriminatory Motivation Need Not Be Shown to Establish Violations of the Thirteenth Amendment

The petitioners argue at length that § 1981 was essentially intended as an equal protection measure (Brief at 18-23), and stress that the statute was re-enacted as part of the Civil Rights Act of 1870, "which was designed to implement the 14th Amendment." It is clear that acceptance of the notion that § 1981 is a creature of the Fourteenth Amendment is indispensable to their argument that the test announced in *Washington v. Davis* be adopted here. But it is now well settled that Congress did not intend to repeal § 1 of the 1866 Act when it enacted § 16 of the 1870 Act pursuant to the Fourteenth Amendment. *Runyon v. McCrary*, 427 U.S. at 168 n.8, 170-72. This reaffirmation that § 1981 has its roots in the Thirteenth Amendment proved critical in determining whether a right of action could be maintained against a private party under § 1981, because the Fourteenth Amendment proscribes only discriminatory actions taken under color of State law. *Johnson v. Railway Express Co.*, *supra*; *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. at 439-40; *cf. Jones v. Alfred H. Mayer Co.*, 392 U.S. at 424-30. By the same

reasoning, the ruling in *Washington v. Davis*, *supra*, that racial motivation is an essential element of proof under the Fourteenth Amendment does not dictate the same result under § 1981.

In *District of Columbia v. Carter*, 409 U.S. 418 (1973), this Court observed that "[d]ifferent problems of statutory meaning are presented by two enactments deriving from different constitutional sources." *Id.* at 423, quoting from *Monroe v. Pape*, 365 U.S. 167, 205-206 (1961) (Frankfurter, J. concurring and dissenting). *Carter* held that the Thirteenth Amendment has a different, and more extensive, reach than the Fourteenth Amendment. *Id.* at 423; see *Clyatt v. United States*, 197 U.S. 207, 217 (1905). In discussing § 1982, this Court held in *Carter* that, "As its text reveals, the Thirteenth Amendment 'is not a mere prohibition of state laws establishing or upholding slavery, but an *absolute declaration* that slavery or involuntary servitude shall not exist in any part of the United States.'" 409 U.S. at 421-22 (citations omitted; emphasis supplied). Section 1982, the Court concluded, was an "'absolute' bar to *all* such discrimination, private as well as public" *Id.* at 422 (emphasis in original).

This, of course, does not mean that, where Congress intends that invidiously discriminatory motivation should be an element of the offense, the Thirteenth Amendment forbids it. See, e.g., *Griffin v. Breckenridge*, *supra*, (42 U.S.C. § 1985(3)).²³ But it is equally clear that Congress has the power under the Thirteenth Amendment to determine the "badges and incidents" of slavery, and the authority to "translate that determination into effective legislation." 403 U.S. at 105; *United States v.*

²³ 42 U.S.C. § 1985(3) authorizes a suit for damages for conspiracies to interfere with civil rights. Wrongful intent has traditionally been regarded as an element of conspiracy because the very nature of a conspiracy demands intentional involvement.

Hunter, 459 F.2d 205, 214 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972). Thus, in the peonage cases, this Court has ruled consistently that discriminatory intent need not be shown in order to establish a violation under the Thirteenth Amendment and its enforcing legislation.

A case in point is *Bailey v. Alabama*, 219 U.S. 219 (1911), striking down, under the Thirteenth Amendment and implementing legislation, a statute, neutral on its face, which imposed criminal penalties on persons who accepted money from an employer and then failed to fulfill the employment contract. In holding the State statute unconstitutional, the Court said:

Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question. *Henderson v. New York* [*Henderson v. Wickham*], 92 U.S. p. 268, 23 L.Ed. 547), and it is apparent that it furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid;

219 U.S. at 244-45. See also *Pollock v. Williams*, 322 U.S. 4, 25 (1944); *Taylor v. Georgia*, 315 U.S. 25, 29 (1942); *Clyatt v. United States*, 197 U.S. 207, 216 (1905) ("this amendment denounces a status or condition, irrespective of the manner or authority by which it is created"); *Anderson v. Ellington*, 300 F.Supp. 789 (M.D. Tenn. 1969) (three-judge court).

More recent cases confirm that the provisions of the 1866 Civil Rights Act which were enacted to implement the Thirteenth Amendment do more than forbid *intentional* discrimination. In *Clark v. Universal Builders*, 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974), § 1982 was held to forbid a practice whereby housing developers would charge higher prices to black purchasers of housing in black parts of the city than were charged to white purchasers of similar housing in white areas of the city, where segregated housing patterns were the result

of racial prejudice. The Court held that, even though the defendant developers were not motivated by a racially discriminatory purpose, § 1982 prohibits the exploitation of "a situation created by socio-economic forces tainted by racial discrimination." 501 F.2d at 330. See also, *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 98 S.Ct. 752 (1978).

Most recently, in *Rhode Island Chapter, Associated General Contractors of America, Inc. v. Kreps*, 450 F.Supp. 338 (D.R.I. 1978), the court extensively discussed the Thirteenth Amendment in considering the constitutionality of the 10% minority business enterprise requirement of the Public Works Employment Act. *Id.* at 360-67. From its examination of the "unique historical relationship of that Amendment to race," 450 F.Supp. at 363, the court concluded that,

Section 1981 assures not just freedom from overt discrimination with invidious intent but also protects against an inequality of results, for under its Thirteenth Amendment power, Congress created a provision which, to use the Supreme Court's words from another context, outlaws "sophisticated as well as simple-minded modes of discrimination," *Lane v. Wilson*, 307 U.S. 268, 275, 59 S.Ct. 872, 876, 83 L.Ed. 1281 (1939) (Fifteenth Amendment.)

As the foregoing cases illustrate, the courts, including the Supreme Court, have consistently recognized that the legislation passed by Congress to enforce the Thirteenth Amendment does not require a showing of discriminatory motivation unless Congress has expressly stated otherwise. See, e.g., 42 U.S.C. § 1985(3).

Petitioners contend that adoption of the *Griggs* standard in § 1981 cases involving employment discrimination

would undercut *Washington v. Davis* and the administrative procedures supplied by Title VII. (Brief at 39.)

The first point, that adoption of the *Griggs* standard would undercut *Washington v. Davis*, is not well taken. *Washington v. Davis* announces a constitutional rule. The issue here is what standard should be applied to a statutory claim. The Court has already applied a less strict standard to claims of governmental discrimination under Title VII in accordance with Congress' intent. *Griggs v. Duke Power Co.*, *supra*. Fullfillment of congressional intent, as long as it is within the legislative power, cannot be said to undercut the constitution.

A complete answer to the second argument is found in *Johnson v. Railway Express Co.*, *supra*, where this Court observed that the possible undesirable effects on the administrative procedure "are the natural effects of the choice Congress made available to the claimant by its conferring upon him independent administrative and judicial remedies." 421 U.S. at 461.²⁴ Imposition of a higher burden of proof in § 1981 cases as compared with Title VII would in fact result in a judicial "preference for one [remedy] over the other", precisely what this Court declined to do in *Johnson*. *Ibid*.

²⁴ Similar arguments were made and rejected in *Jones v. Alfred H. Mayer Co.*, *supra*, and *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969). In *Sullivan*, the Court said:

We noted in *Jones v. Mayer Co.*, that the Fair Housing Title of the Civil Rights Act of 1968, 82 Stat. 81, in no way impaired the sanction of § 1982. 392 U.S., at 413-417, 20 L.Ed.2d at 1192-1194. What we said there is adequate to dispose of the suggestion that the public accommodations provision of the Civil Rights Act of 1964, 78 Stat. 243, in some way supersedes the provisions of the 1866 Act. For the hierarchy of administrative machinery provided by the 1964 Act is not at war with survival of the principles embodied in § 1982.

396 U.S. at 237.

III.

42 U.S.C. § 1981 PROVIDES A MECHANISM BY WHICH TO APPLY THE DISPARATE-IMPACT STANDARD OF TITLE VII TO EMPLOYMENT DISCRIMINATION CASES BROUGHT UNDER § 1981

Petitioners have argued that, irrespective of its constitutional origins, § 1981 is basically an equal protection provision. They repeat the concern, voiced by this Court in *Washington v. Davis*, that adoption of the racially disproportionate impact standard might call into question the validity of a broad range of legislation.²⁵ Whatever force the petitioners' argument might have, it is necessarily directed to the "equal benefit" clause of § 1981. That clause, of course, is not involved in this suit. The "equal benefit" clause has been rarely utilized and its scope is uncertain. However, that clause, as well as the "like punishment" clause, plainly embraces separate and distinct rights than the others specifically enumerated in § 1981, and may embody different considerations. *Mahone v. Waddle*, 546 F.2d 1018, 1026-1030 (1977).

In *Johnson v. Railway Express Co.*, *supra*, this Court stressed that § 1981 "on its face relates primarily to racial discrimination in the making and enforcing of contracts." 421 U.S. at 459. This is such a case. There is no need to determine the meaning of the "equal benefit"

²⁵ It is important to recognize that, unlike the Fourteenth Amendment, § 1981 and the Thirteenth Amendment are fully applicable to actions taken by private persons. None of the reasons for adopting the intent requirement for Fourteenth Amendment claims apply to challenges to the actions of private persons. It would certainly be an undesirable result to have different rules as to the meaning of the Thirteenth Amendment depending on the nature of the defendant, and this militates against a reflexive application of the *Washington v. Davis* Fourteenth Amendment standard to this case.

clause because 42 U.S.C. § 1988 provides the mechanism by which to answer the narrow question presented.

As this Court said in *Moor v. County of Alameda*, 411 U.S. 693, 702 (1973), “[i]nvariably existing federal law will not cover every issue that may arise in the context of a federal civil rights action.” The Reconstruction Congress anticipated this and enacted what is now § 1988 as part of the Civil Rights Act of 1866.²⁶

In pertinent part, § 1988 provides:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent

²⁶ Section 1988 was enacted as part of § 3 of the Civil Rights Act of 1866, 14 Stat. 27. Section 1 of that Act was the source of §§ 1981 and 1982. As explained in *Moor*:

The initial portion of § 3 of the Act established federal jurisdiction to hear among other things, civil actions brought to enforce § 1. Section 3 then went on to provide that the jurisdiction thereby established should be exercised in conformity with federal law where suitable and with reference to the common law, as modified by state law, where federal law is deficient. Considered in context, this latter portion of § 3, which has become § 1988 and has been made applicable to the Civil Rights Acts generally, was obviously intended to do nothing more than to explain the source of law to be applied in actions brought to enforce the substantive provisions of the Act, including § 1. *Moor v. County of Alameda*, 411 U.S. at 704-705.

with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. [Emphasis supplied.]

This section is intended to “complement the various acts which . . . create federal causes of action for the violation of civil rights.” *Moor v. County of Alameda*, 411 U.S. at 702. It uses sweeping language. “It reflects a purpose on the part of Congress that the redress available will effectuate the broad policies of the civil rights statutes.” *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961), cert. denied, 368 U.S. 921 (1961).

In order to vindicate the rights conferred by the Civil Rights Acts, § 1988 directs that the jurisdiction of the Federal courts “shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect.” Title VII is such a law. In *Johnson v. Railway Express Agency*, supra, the Court said:

that the remedies available to the individual under Title VII are co-extensive with the individual’s right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive.

421 U.S. at 459, quoting H.Rep. No. 92-238 at 19 (1971). This Court also held, in *Griggs v. Duke Power Co.*, supra, that Congress has made plain its intention, in the statutory language of Title VII, that it is the consequences of employment practices, and not motivation, which the Act is intended to eliminate. We have argued that a similar intent on the part of Congress is manifest in the language of § 1981. But to the extent that there is any doubt, there is no reason why § 1988 should not perform the task which Congress specifically assigned to it: to

fill in the interstices of the Civil Rights statutes with current federal law insofar as "such laws are suitable" to carry them into effect. 42 U.S.C. § 1988. *Cf. Johnson v. Ryder Truck Lines, Inc.*, 575 F.2d 471, 474 (4th Cir. 1978) (dictum), *cert. filed*, 47 U.S.L.W. 3153 (1978).

Although most cases to have come before the courts have involved the importation of remedial or procedural rules from State law when the Civil Rights statutes are silent, *see, e.g., Robertson v. Wegmann*, 56 L.Ed.2d 554 (1978); *Jones v. Hildebrant*, 432 U.S. 183 (1977), it is clear that § 1988 is not so limited. This is clear from the statutory language, stated in the disjunctive, that State law may be referred to where the laws of the United States "are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies. . . ." The "object" referred to is plainly the vindication of civil rights. *Robertson v. Wegmann*, 56 L.Ed.2d at 564 (Mr. Justice Blackmun, dissenting).

In *Washington v. Davis*, *supra*, this Court stated that extension of the Title VII disparate-impact rule "beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription." 426 U.S. at 248. Application of the rule to § 1981 employment discrimination causes of action through the application of § 1988 would be fully consistent with that principle.

Additional support for the use of § 1988 is found in *Johnson v. Railway Express Co.*, *supra*, where the Court said that, in view of the fact that Congress had created two independent remedies against discrimination in employment on the basis of race, it was disinclined to "infer any positive preference for one over the other, without a more definite expression in the legislation Congress has enacted . . .". 421 U.S. at 461. Plainly, it would show a preference for one remedy over the other if intent were required to be proven under § 1981 but not under Title VII.

In fact, there is strong evidence that Congress looked to § 1981 to afford greater protection than was available to employees under Title VII. In passing the Equal Employment Opportunity Act of 1972, Congress refused to amend Title VII to make it the exclusive remedy for employment discrimination. 118 Cong. Rec. 3173 (1972). As the debates show, Congress believed that § 1981 reaches discrimination not within the reach of Title VII and that it desired to preserve § 1981 as an independent remedy for the sake of the difference in coverage. *See* 118 Cong. Rec. 3370, 3962-63 (1972) (remarks of Sen. Javits); 118 Cong. Rec. 3372, 3964 (1972) (remarks of Sen. Williams, floor manager of S. 2515). As explained by Sen. Javits, the necessity of having to make a number of political compromises to gain passage of Title VII in 1964 had weakened it, and other remedies, including § 1981, were necessary to fill the gaps. 118 Cong. Rec. at 3962-63.

CONCLUSION

For the foregoing reasons, *amicus* submits that the writ of certiorari be dismissed as improvidently granted but that, if the Court reaches the merits, the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1978

COUNTY OF LOS ANGELES, ET AL., PETITIONERS

v.

VAN DAVIS, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**MEMORANDUM FOR THE UNITED STATES AND THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AS AMICI CURIAE**

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QUESTIONS PRESENTED

In our view, the questions framed by petitioners are not properly presented in this case and the writ of certiorari ought to be dismissed as improvidently granted. Shortly stated, those questions are:

1. Whether the use of arbitrary employment criteria which are racially exclusionary in operation,

(1)

although not purposefully discriminatory, violates 42 U.S.C. 1981.

2. Whether the imposition of minimum hiring quotas for minority applicants, provided they are fully qualified for the job, is an appropriate remedy in this employment discrimination case.

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This case, although brought by private plaintiffs, is said to present questions concerning Title VII of the Civil Rights Act of 1964 and its relationship to 42 U.S.C. 1981, as well as the appropriate remedies for violation of both statutes. There is, of course, a direct federal responsibility for enforcement of Title VII, assigned by Congress to the Equal Employment Opportunity Commission, the Department of Justice, and the Civil Service Commission. The United States also has an interest in the correct construction and effective operation of Section 1981. For that reason, we have participated as *amicus curiae* in previous cases in this Court involving Section 1981 and the companion statute, Section 1982. See, *e.g.*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Runyon v. McCrary*, 427 U.S. 160 (1976). The same considerations suggest our speaking here.

STATEMENT

1. This class action was filed on January 11, 1973, by black and Mexican-American incumbent

Los Angeles County firemen and applicants, alleging hiring discrimination in violation of 42 U.S.C. 1981, 42 U.S.C. 1983, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. (and Supp. V) 2000e *et seq.*¹ The union representing incumbent firemen was allowed to intervene. The plaintiffs requested, and the district court ordered, that the plaintiff class be defined to consist of present and future black and Mexican-American applicants to, and employees of, the fire department. The class was not defined to include past applicants (A. 41, 83).

At the time the complaint was filed in January 1973, the fire department consisted of 1972 firemen, of whom 0.5% (nine) were black and 2.8% (50) were Mexican-American (A. 38-39). The proportion of blacks and Mexican-Americans in the County population at the time was 10.8% and 18.3%, respectively (A. 39).² Evidence in the record established that applicants for the entry level position of fireman have traditionally been required to take a written test as part of the application procedure (A. 21). Applicants with the highest scores were then given

¹ The original complaint did not allege a violation of Title VII. However, Title VII was invoked in plaintiffs' second amended complaint (A. 1-10), to which was attached the Equal Employment Opportunity Commission charge filed by plaintiffs and a "right to sue" letter issued by the Department of Justice.

² In contrast to the small number of blacks and Mexican-Americans in the fire department, 60% of the County positions paying less than that of fireman were filled by blacks and Mexican-Americans (Tr. 54, 69).

a physical agility test and an oral interview.³ These three elements of the examination process were assigned weights and a total score was computed for each applicant. Those not eliminated were then placed on an eligibility list and selected in rank order as vacancies occurred (A. 101).

Minority group applicants have done extremely poor on the County's written tests. The parties stipulated that in 1969, 1424 applicants sat for the written test (*id.* at 21-22). Of these, 17% (244) were black, 8.1% (100) were Mexican-American, and 75.8% (1080) were white (*ibid.*). Of the 407 applicants called for interviews following the written and physical agility tests, 4.5% (19) were black and 3.4% (14) were Mexican-American (A. 23). Thus, 35% (383) of the whites who took the written test passed it, whereas only 7% of the black and 14% of the Mexican-American applicants did so (*id.* at 27).

Although the County was aware as early as 1969 that its written tests had an adverse impact upon minority applicants (Tr. 42-43), it administered a similar test in January 1972. The County originally had planned to use the test solely to eliminate functional illiterates from consideration (about two percent of those taking the test).⁴ The County had determined

³ There was no evidence that either the physical agility test or the oral interview had a discriminatory impact on minority applicants (see, e.g., A. 24).

⁴ The test was administered to 2414 applicants. Of these, 1904 (78.9%) were white, 196 (8.1%) were black and 283

to select approximately 500 of the remaining applicants by lot for oral interviews (Tr. 65; A. 102-103). This procedure would have "eliminated the written test as a ranking device" and would have given "every passing applicant an equal opportunity to be chosen for an oral interview" (A. 103). Before the lottery system could be implemented, however, a suit was brought in state court to enjoin that procedure on the ground that it would violate provisions of the County charter and civil service regulations (*ibid.*). The state court preliminarily enjoined the use of the random selection procedure pending a trial on the merits (*ibid.*).

In December 1972, while the state court injunction was still in effect, the County determined that it would interview applicants who had received the top 544 scores on the 1972 written test in order to fill the increasing number of vacancies (*ibid.*). Of the top 544 applicants, 90.4% (492) were white, 1.8% (10) were black, 6.0% (33) were Mexican-American, and the remainder were "other races" (A. 24). The County did not implement that plan either, however. Upon hearing that the present suit was to be brought, the County abandoned its proposal in early January 1973, and instead interviewed all but the lowest scoring 3.1% of the applicants (A. 24-25).⁵

(11.7%) were Mexican-American (A. 24). The remaining 31 applicants were evidently of other races. Those who passed were: 1,885 whites, 170 blacks and all 283 Mexican-Americans (A. 24, 103).

⁵ Although a stipulation refers to January 1972 as the time when interviews were commenced and the plan to limit those

The resulting rankings had no adverse impact on blacks or Mexican-Americans (A. 25). On the contrary, some 31% of those at the top of the new eligibility list belonged to these minorities (*ibid.*) and half of those actually hired in the Spring of 1973 were blacks or Mexican-Americans (see A. 6; Pet. Br. at 8-9).

It was stipulated that the written entrance examination used by the County had not been validated as predictive of job performance (A. 23), and at trial the County's personnel director testified that in his judgment the tests were almost useless except to eliminate functional illiterates (Tr. 79). Plaintiffs' testing expert confirmed the personnel director's assessment of the written tests (Tr. 207-208).⁶

interviews to the top 544 was abandoned (A. 24), this is obviously an error (see A. 105 n.2). It is clear that interviews of *all* applicants not shown to be illiterates commenced in January 1973 (A. 25, 91 n.14, 104), and, presumably, the decision to follow that procedure immediately preceded. Moreover, it was expressly found that the previous plan to interview only the top 544 applicants was abandoned only when petitioners learned "that this law suit was about to commence" (A. 39, 91 n.14); the present suit was filed on January 11, 1973; and this would jibe with a date of January 8, 1973 (see A. 25; Tr. 48-49).

⁶ Evidence was also introduced regarding the impact of the County's minimum height requirement. Until 1971, the county had a minimum height requirement of 5'3" for firemen (A. 24). In 1971 that requirement was lowered to 5'7". The parties stipulated that a study had been done which showed that 41% of all male Mexican-Americans and only 14% of all male Caucasians in Los Angeles County were shorter than 5'7" (Tr. 200). Despite this adverse impact, the County had never attempted to validate the minimum height requirement (A. 28).

2. Assessing this evidence, the district court found that petitioners had not acted "with a willful or conscious purpose of excluding blacks and Mexican-Americans from employment at the Los Angeles County Fire Department" (A. 41). Nevertheless, the court concluded that they "did intentionally engage in employment practices which had the effect of discriminating against" these minorities (A. 42; see also A. 41). The violations were specified (A. 39):

- (a) [u]tilizing, until learning that this lawsuit was about to commence, written tests as a selection device for entry level positions at the Los Angeles County Fire Department, although such tests had a disproportionate detrimental impact upon black and Mexican-American applicants, and despite the fact that such tests have not been shown by a validation study to be related to or predictive of job performance statistically.

And

- (b) [f]ailing and refusing to take necessary affirmative steps to overcome the existence in the black and Mexican-American communities of Los Angeles County of a reputation that the Los Angeles County Fire Department discriminates against blacks and Mexican-Americans.

The 5'7" height requirement, on the other hand, was found to be "substantially and reasonably related to job performance as a fireman" (A. 39).

The judgment of the district court permanently enjoined the defendants from discriminating against

blacks and Mexican-Americans and ordered that (A. 46):

3. A minimum of twenty per cent (20%) of all new employees employed in fireman positions at the Los Angeles County Fire Department, in any one year, beginning with July 1, 1973, shall be blacks until such time as the percentage of blacks in the fireman workforce of the Los Angeles County Fire Department is equal to the percentage of blacks in the general population of Los Angeles County.

4. A minimum of twenty per cent (20%) of all new employees employed in fireman positions at the Los Angeles County Fire Department, in any one year, beginning with July 1, 1973, shall be Mexican-Americans until such time as the percentage of Mexican-Americans in the fireman workforce of the Los Angeles County Fire Department is equal to the percentage of Mexican-Americans in the general population of Los Angeles County.

But the court expressly added (A. 47):

Nothing in this Order shall in any way be deemed to require or encourage Defendants: (a) to employ any person not qualified for a fireman position with the Los Angeles County Fire Department; or (b) to in any way lower or refrain from increasing the standards for employment as firemen at the Los Angeles County Fire Department, provided such standards are reasonably related to the qualifications of potential firemen; all other provisions in this order are subordinate to the provisions of this paragraph

* * * and shall be subject to modification in the event of any conflict herewith.

3. The court of appeals affirmed in part, reversed in part and remanded the case for further consideration.⁷ The court held that "[i]n light of the fact that plaintiffs' class did not include any prior unsuccessful applicants, it follows that plaintiffs neither suffered nor were threatened with any injury in fact from the use of the 1969 examination," and therefore concluded that "plaintiffs lacked standing to challenge defendants' prior use of the test in 1969" (A. 83). However, the court of appeals affirmed the district court's holding that the County's plan to rank applicants based upon the 1972 written entrance examination and to interview only those with the top 500 scores was unlawful because it would have had an adverse impact on blacks and Mexican-Americans and was not job related (A. 84-91). Although the County had not hired anyone on the basis of the discriminatory examination, and had discontinued use of the examination except to screen out illiterates after it had been informed that this suit was to be filed, the threat to use the examination persisted (A. 91 & n.14; see also A. 105 & n.2, Wallace, J.).⁸

⁷ The court of appeals issued two opinions (A. 52-78, A. 79-119), the latter on defendants' motion for rehearing. Unless otherwise noted, references are to the court's second opinion.

⁸ The only discriminatory act—the threatened discriminatory use of the 1972 test—that the court of appeals found plaintiffs to have standing to challenge therefore occurred after the effective date of Title VII (see pages 14-15, *infra*).

The court ruled that the 1972 test, as it was intended to be used by the County, violated 42 U.S.C. 1981 as well as Title VII (A. 90-91 & n.14). It held that in employment discrimination suits, the standards announced in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), apply to Section 1981 because the courts of appeals had uniformly "employed Title VII principles as a benchmark" in such suits (A. 88). The court distinguished *Washington v. Davis*, 426 U.S. 229 (1976), in which this Court ruled that evidence of discriminatory purpose is necessary to establish violations of the Fifth and Fourteenth Amendments.

The court of appeals reversed the district court's finding as to the minimum height requirement, holding that the testimony upon which the district court relied "falls far short of validating" the height requirement under the standards of *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (A. 92). The court concluded that this requirement violated both Title VII and Section 1981 (A. 92 n.15).

With regard to the relief ordered by the district court, the court of appeals approved, as a general matter, of hiring quotas as remedies "to erase the effects of past discrimination" (A. 95). However, the court did not affirm the district court's order, holding that (A. 96):

The court * * * should reconsider its order in light of our decision that the 5'7" height requirement is invalid and that plaintiffs lacked standing to challenge defendants' use of the 1969 written examination.

Judge Wallace dissented. He agreed with three parts of the majority's opinion: that plaintiffs lacked standing to challenge pre-1972 actions of the County (A. 99); that the County's continued threat to use the fireman's test in a discriminatory manner constituted a violation of Title VII (A. 105); and that *Washington v. Davis*, *supra*, "does not address the question of whether cases brought under section 1981 * * * always require proof of discriminatory intent * * *" (A. 107). However, the dissent disagreed with the majority's other conclusions. Having determined that the only violations at issue occurred after the effective date of Title VII, and that the County had violated Title VII, Judge Wallace thought it unnecessary to examine whether the County had also violated Section 1981 (A. 105-106). He argued, however, that, "[b]ecause section 1981 is peculiarly linked to the Fourteenth Amendment, the standards pertaining to that amendment should also control section 1981" (A. 109). The dissenting judge also stated his view that hiring quota relief was inappropriate in this case. Noting that racial imbalance in the fire department was neither aggravated nor perpetuated by the 1972 examination, he argued that the "limited threat of discrimination" which the examination represented "does not create a proper platform from which to reach back to correct the racial imbalance" (A. 118, footnote omitted). The dissent concluded that the district court could fashion an effective order prohibiting the use of the 1972 examination "without imposing quotas" (A. 119).

DISCUSSION

Our submission is that the writ of certiorari issued in the case should be dismissed as improvidently granted. A careful review of the record persuades us that the issues framed by petitioners are not properly presented and that, in the circumstances, the Court will wish to dismiss the writ in accordance with its usual practice. See, *e.g.*, *Belcher v. Stengel*, 429 U.S. 118 (1976); *McClanahan v. Morauer & Hartzell, Inc.*, 404 U.S. 16 (1971); *Tyrrell v. District of Columbia*, 243 U.S. 1 (1917); *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955), and cases collected at 78-79 n.2.

Of course, deference to the Court, as well as a natural diffidence about prejudicing the course of litigation in which we are not parties, makes us reluctant to suggest that certiorari was improvidently granted. But this is not an ordinary private lawsuit. As we have noted (*supra*, page 2), the questions raised by the petition are of immediate interest to the government and implicate public rights of vital importance to minorities throughout the Nation. Those considerations, we believe, make our participation in the case appropriate. Yet, if we are to speak at all, our duty to the Court requires disclosure of the obstacles which, in our view, inhibit review here. Cf. *Fusari v. Steinberg*, 419 U.S. 379, 387 n.12, 390-391 (1975). The task falls to us because neither the petition nor the brief in opposition, nor petitioners' brief, suggests any doubt whether the questions said to be presented are properly in the case. Cf. Brief

for the United States as *amicus curiae* in *Belcher v. Stengel*, No. 75-823.

It may be that its procedural history had obscured the posture of the case as it reached this Court. The district court premised its remedial order—which included minimum hiring quotas (A. 46, 48-50)—primarily on a finding of discrimination occurring before Title VII became applicable to state public employers in March 1972 (A. 38, 41-43). Accordingly, reliance on 42 U.S.C. 1981 was necessary and both the questions now said to be presented were in the case when it came to the court of appeals. Initially, that court affirmed in all respects, except only that, contrary to the district court, it held the height limitation illegal (A. 52-66). At that stage, the court of appeals expressly based its judgment on the assumption that all actionable conduct, and relevant effects, occurred before March 24, 1972, and were therefore reachable only under Section 1981 (A. 56-57). Thus, until that opinion was withdrawn, the issues presented by petitioners remained. But the court of appeals granted rehearing, and, as we elaborate in a moment, the new opinion and judgment reached very different conclusions as to *when* actionable discrimination occurred and what *remedy* might be appropriate. The upshot is that issues once at the heart of the case are no longer present.

1. The first question said to be presented is whether Section 1981, like Title VII, reaches conduct which is not purposefully discriminatory but has a disparate adverse impact on racial minorities. At

least in a case like this one, that issue is wholly academic with respect to any period during which Title VII was in effect—here beginning March 24, 1972. To be sure, the applicability of Title VII does not foreclose a claim under Section 1981. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-49 (1974); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460-461 (1975); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). But, if Title VII plainly covers the whole case and affords all possible relief, the Section 1981 claim is mere surplusage. In that situation, it may be questioned whether any court ought to reach out to decide a novel and difficult question under the more general statute. In any event, however, this Court will not normally review the alternative holding when it has no effect on the judgment. *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). And, although certiorari has already been granted, the writ usually will be dismissed. See, e.g., *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 465 n.5 (1962).

Those principles govern here. Both courts below have held that petitioners' conduct violated Title VII. Although that ruling is now questioned (Pet. Br. at 48-51), it was not challenged by the petition for certiorari, and, accordingly, the issue is not before the Court. E.g., *Jones v. Hildebrandt*, 432 U.S. 183 (1977). As it happens, the conduct found violative of Title VII was, according to the final decision of the court of appeals, the only actionable conduct reachable in this suit. That was the consequence of

the holding, on rehearing, that the plaintiff class was unaffected by, and therefore lacked standing to complain about, the use of the 1969 written test or, indeed, any other acts of petitioners before late 1972 (A. 81-83)—by which time Title VII was in effect. Since there is no reason to believe that the nature of the relief would be affected, in this case, by remedies available under Section 1981 but not Title VII, the court's discussion of Section 1981 was, as the dissent noted (A. 105-106), "wholly unnecessary." The upshot is that the judgment below rests on an independent ground not open in this Court and that a decision on the Section 1981 issue will have no effect on the case.

2. Somewhat different considerations counsel against this Court's now deciding the other question said to be presented. Essentially, the quota hiring order is not final and accordingly is not ripe for review here.

In its initial decision, the court of appeals approved the district court's imposition of minimum quotas and remanded the case only "for reconsideration of the proper ratio of accelerated racial hiring to be ordered" in light of the holding that the 5'7" height requirement for firemen was unlawful (A. 53-54; see, also, A. 65-66). Presumably, this disposition would have left open only the question whether the quota for Mexican-Americans should be *increased*. But see pages 19-20, *infra*. Had that remained the judgment of the court below, it would indeed have presented the issue whether a "catch up" quota was appropriate relief in the circumstances. But here, also, the court's

decision on rehearing was substantially different. Although most of the broad language of the first opinion approving affirmative relief (A. 61-66) is reproduced in the second (A. 92-97), there is a critical distinction: under the final judgment, the district court on remand must reconsider its remedial order, not only because of the ruling invalidating the height limitation, but also "in light of [the appellate court's holding] * * * that plaintiffs lacked standing to challenge defendants' use of the 1969 written examination" (A. 96).

This may well require the district court to withdraw its order mandating accelerated quotas and to substitute a lesser remedy, perhaps including no quota provision. At the least, the question of the appropriate relief is re-opened, since "the scope of the remedy is determined by the nature and extent of the * * * violation." *Milliken v. Bradley*, 418 U.S. 717, 744 (1974); see *Teamsters v. United States*, 431 U.S. 324 (1977); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); *Hazelwood School District v. United States*, 433 U.S. 299 (1977).⁹ In sum, the

⁹ It is clear, of course, that minimum hiring quotas may be ordered in an appropriate case. The 1972 amendments to Title VII, which apply here, added to Section 706(g), 42 U.S.C. (Supp. V) 2000e-5(g), authority to award "any other equitable relief as the court deems appropriate." That language must be read against congressional rejection of proposed amendments that would have barred hiring ratios (118 Cong. Rec. 1676, 4918 (1972)) and the express defense of two decisions approving such relief by Senators Javits and Williams, the principal spokesman against the limiting proposals. *Id.* at 1662-1676, 4917-4918. This is, moreover, the unanimous conclusion of the eight courts of appeals that have considered the question. See A. 94-95.

ultimate result is not yet known, even in broad outline, and, in these circumstances, this Court would normally decline premature review. See, e.g., *Firemen v. Bangor & A. R. Co.*, 389 U.S. 327 (1967).

3. What has been said sufficiently indicates that, given the failure of the petition for certiorari to challenge the Title VII ruling of both lower courts, this Court's intervention in the case is likely to result in no more than an advisory opinion. It need hardly be said that this is a role the Court has steadfastly eschewed. But there is yet a further reason for declining review: the staleness of the case.

The primary group among the remaining plaintiffs and the class they represent¹⁰ are blacks and Mexican-Americans who applied for openings as firemen six years ago, in late 1971 (A. 3, 20, 21, 25, 68, 83). They were required to take a written test in January 1972, which, at the time, was intended only to screen out functional illiterates (A. 3, 24, 71-72, 102-103). Between some date in late 1972 and January 8, 1973, petitioners impermissibly threatened to use the test results as a basis for ranking applicants (A. 24-25; *supra*, note 5). But, on the latter date, that plan was abandoned and petitioners have not engaged in any

¹⁰ Some of the original plaintiffs were incumbent firemen and a class of incumbent blacks and Mexican-Americans was listed as claimants (A. 3). This was presumably because discrimination in promotion, as well as hiring, was alleged (A. 4-5, 8-9). That claim, however, was not sustained, if, indeed, it was pressed (see A. 38-43). It follows that the only "live" plaintiffs are rejected applicants who initially applied in 1971 and those who applied subsequently.

discriminatory practice since. Indeed, although the potential existed for a short period, no one (including the plaintiffs) has actually suffered discriminatory treatment since the plaintiffs became applicants in October 1971 (A. 83). And it is apparently unchallenged that the County's hiring record in the last five and a half years has been exemplary (Pet. Br. at 10).

We do not suggest that the district court's order was entered improvidently. On the contrary, since petitioners abandoned their unlawful plan only when the present suit was imminent (A. 39, 91, 105), the court was, in our view, fully justified in enjoining a "return to [the] old ways." See *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-633 (1953). But that was more than five years ago, in July 1973 (A. 45; Pet. Br. at 3). In the meanwhile, we are told, some 207 black or Mexican-American firemen have been hired, constituting more than 50% of the new recruits taken on in the five-year period (Pet. Br. at 10). Presumably, the plaintiff minorities now together account for some 12.6% of the total force of the Los Angeles County Fire Department.¹¹ Although this is far from the 29% of the County population represented by blacks and Mexican-Americans, it is a radical im-

¹¹ This figure assumes that the total number remains 1,762 (see A. 39; but see A. 11, 19-20; Pet. Br. at 3) and that blacks and Mexican-Americans have left the force at the same rate as others. On that basis, some 12 of the original 59 minority firemen (A. 20) would have left, and, adding the 207 new recruits to the remaining 47, we reach a total of 254.

provement over the 3.3% minority membership in January 1973 when this suit was filed.

In light of this experience, it may be that the district court today would appraise differently the need for rigid remedial quotas. For all we know, the district court may properly take the view that what seemed reluctant acquiescence in 1973 has, five years later, given way to good faith compliance with the law. Since the court of appeals has remanded the case to reconsider questions of remedy, it would seem inappropriate for this Court to adjudge the matter on a stale record when changed circumstances might persuade the district court to withdraw or alter its order in significant respects. Cf. *Calhoun v. Latimer*, 377 U.S. 263 (1964).

4. Finally, there is one aspect of the case which is not sufficiently fleshed out to permit intelligent review by this Court at the present time. We refer to the holding of the court of appeals invalidating the 5'7" height requirement. Although that ruling is now final, not having been challenged by the petition for certiorari insofar as it rests on Title VII (see A. 91-92 & n.15), it presumably affects the remedial order that ultimately must be entered (see A. 80-81, 96). Yet, the record before this Court reveals almost nothing about the past and present impact of that requirement.

To be sure, the district court noted the parties' stipulation that the 5'7" height rule "eliminate[d] from consideration approximately 41% of the Mexican-American male population" (A. 40). But, con-

cluding that the requirement was valid (A. 39, 40, 42), the court did not pursue the matter, merely reducing the Mexican-American quota to reflect the ineligibility of a large portion of that population (A. 40, 80-81). The court of appeals, although reversing on this issue (A. 91-92), expressly left open on remand how its ruling should affect a remedial order (A. 81, 96). Nor is the solution obvious. Among other difficulties confronting the district court will be how to adjust the quotas, if quotas are retained, to reflect the newly eligible shorter Mexican-Americans without prejudicing the plaintiffs, or at least the black plaintiffs; and, if quotas are eliminated, how to identify and make whole the victims of this discriminatory requirement. See A. 100-101. Plainly, these are not matters for initial decision by this Court, without benefit of an adequate factual record or rulings by the lower courts.

5. For the several reasons just articulated, we submit that this case is a wholly inappropriate vehicle for decision of far reaching questions that may govern much other litigation. Presumably, the issues will come before the Court in a proper case in due course.¹² But, at all events, we urge the Court to decline the present invitation. It is not apparent why petitioners have sought to obtain review of a first question that cannot affect the judgment and a second that is not

¹² For the reasons given in our brief in opposition to that pending petition, we do not believe *Johnson v. Alexander*, No. 78-5180 is such a case. *Johnson v. Ryder Truck Lines, Inc.*, petition pending, No. 78-179, presents a somewhat different question, albeit, in defending the judgment, respondents may raise the Section 1981 issue sought to be presented here.

ripe and may well disappear after remand, on a record that is in part stale and in another part incomplete. Whatever their motives, however, this Court cannot be expected to waive its salutary rules of practice to resolve points of law of general interest but not properly presented in the case. In all the circumstances, the right course, we believe, is to dismiss the writ as improvidently granted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be dismissed as improvidently granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1553

COUNTY OF LOS ANGELES;
BOARD OF SUPERVISORS OF THE COUNTY
OF LOS ANGELES and CIVIL SERVICE COMMISSION OF THE
COUNTY OF LOS ANGELES

Petitioners,

vs.

VAN DAVIS, HERSEL CLADY and FRED VEGA, individually and on behalf of all others similarly situated, WILLIE C. BURSEY, ELIJAH HARRIS, JAMES W. SMITH, WILLIAM CLADY, STEPHEN HAYNES, JIMMIE ROY TUCKER, LEON AUBRY, RONALD CRAWFORD, JAMES HEARD, ALFRED R. BALTAZAR, OSBALDO A. AMPARAH, individually and on behalf of all others similarly situated.

Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit**

**BRIEF OF AMICUS CURIAE
IN SUPPORT OF PETITIONERS' BRIEF**

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INTRODUCTION

The County of Los Angeles, hereinafter Petitioner, has certified as error the ruling of the Court of Appeals for the Ninth Circuit that a showing of statistical adverse impact resulting from the application of an employment selection examination is sufficient to establish a *prima facie* violation of Title 42 U.S.C. §1981. In addition, Petitioner has questioned the validity of that ruling in terms of the scope and effectiveness of the racial hiring order.

As noted in more detail below, San Francisco is presently defending a lawsuit challenging its police department hiring procedures. That case is set for trial on October 24, 1978. One of the central issues in that case involves whether a *prima facie* case may be made out against San Francisco on a mere showing of statistical adverse impact in the administration and application of entry and promotional examination in the department. The constitutional conflict between Congress' power to establish national economic policy in the area of employment and state and local prerogatives to order their sovereign operations lies in the balance. And in particular the civil service merit system adopted early in this century across this country is threatened with destruction as a consequence of quota hiring which substitutes racial criteria for merit and which tends to discourage white males and those minorities who may not lay claim to the privileged status of being victimized through adverse impact from seeking advancement based on their knowledge and grasp of a police department's operations.

The merit system of public employment selection

was adopted as a reform to replace the spoils system which all too often was ethnically or racially oriented by politicians who viewed the citizenry as consisting of ethnic voting blocks. These politicians were more concerned with the political gains to be derived from public service appointments than with the individual talents of the applicants and the benefits to the public to be derived from the appointment of high quality applicants. Adverse impact standards and quota hiring orders nullify the very procedures which civil service reform sought to eliminate. Thus there is more to this case than the abstract question of what is necessary for a *prima facie* case against a public employer. What lies in the balance is the well established and soundly based civil service system of merit appointment as well as the power of state and local governments to order their affairs within the range of whole options permitted under the Fourteenth Amendment. It is to these essential issues that San Francisco addresses this amicus curiae brief.

A word of caution is also in order. The case only involves questions relating to constitutional limitations on Congressional power to regulate state and local governments in their employment practices. Congress has only prohibited "discrimination" in employment. As will be more fully developed below this prohibition should be interpreted in the context of public employers extending to and proscribing only those employee section practices of public employers which amount to constitutional violations. The EEOC in going beyond this limit has exceeded its statutory and constitutional

authority. It may very well be that in the private sector where until relatively recently racial and religious discrimination were legal and prevalent there was a need and basis for Congressional action. Intentional racial and religious discrimination by public employers and always has been, since the ratification of the Fourteenth Amendment, illegal. Enforcement of the Fourteenth Amendment through the prohibition of and specification of remedies for constitutional violations is sufficient to implement the policy of the Fourteenth Amendment while not nullifying the separate existence of the states as political entities and Federal system as contemplated by the Tenth Amendment.

The City and County of San Francisco, hereinafter San Francisco, has a vital interest in the outcome of this case. Since 1970, San Francisco has expended considerable amounts of time, money and human resources in an effort to improve the racial mix of its fire and police departments. To date the courts in the Northern District of California have consistently applied the adverse (or disparate) impact standard against San Francisco in litigation involving both the San Francisco Police and Fire Departments.¹ In both the *WACO* and the *Officers for Justice* cases, the plaintiffs challenged the written examination used to select police officers and firefighters in San Francisco on the basis

1. See *Western Addition Community Organization v. Alioto*, 514 F.2d 542 (1975) (9th Cir.) (hereinafter referred to as "*WACO*") and the extensive detail set forth in district court decisions reported at 330 F. Supp. 536 (N.D.Cal. 1971); 340 F.Supp. 1351 (N.D.Cal. 1972); 360 F.Supp. 733 (N.D.Cal. 1973); 369 F.Supp. 77 (N.D.Cal. 1973). See also *Officers for Justice v. Civil Service Commission of San Francisco*, 371 F.Supp. 1328 (N.D.Cal. 1973) and 395 F.Supp. 378 (N.D.Cal. 1975) (hereinafter referred to as "*Officers For Justice*.")

of Title 42 U.S.C. §§1981 and 1983.² In both *WACO* and *Officers for Justice*, the plaintiffs in establishing entitlement to relief against the written examination, relied solely on statistical evidence demonstrating an adverse impact on identifiable minorities. In both cases there was no evidence of any intentional discrimination and in both cases San Francisco was unable to develop an employment selection device which could pass muster under the rigorous empirical validation rules set down in the Equal Employment Opportunity Commission (hereafter, "EEOC") guidelines.³ These guidelines were promulgated by the EEOC pursuant to Title VII, were applied in 1981, 1983 cases to exams which had all been created prior to the effective date of the 1972 amendment to Title VII, extending the statute to public employees.

As a result, in both cases injunctions were issued which effectively nullified San Francisco's professionally developed though not empirically validated examinations for police officers and firefighters. The court orders also contravened the San Francisco Charter and common law concepts of competitive examinations for civil service employment. In *WACO*, San Francisco was required to lower the passing grade on the firefighter written examination to such a level that it no longer served any useful purpose as a device for select-

2. In 1977 the *Officers for Justice* complaint was amended so as to include a cause of action based on Title VII of the Civil Rights Act of 1964, Title 42 U.S.C. §2000e. However, all litigated issues to date have involved claims based solely on Title 42 U.S.C. §§1981 and 1983.

3. Those rules were embodied in EEOC guidelines §1607 C.F.R. After President Carter's reorganization of enforcement agencies, the EEOC issued—8/23/78 new uniform guidelines. They are not yet available.

ing competent employees. San Francisco was also required to cease using it as a ranking device. As a result, applicants were no longer ranked according to their performance on the written examination. Rather those who "made the cut" on the written examination were ranked on the basis of their performance in the physical examination and in the oral interview pursuant to court order.

And as will be demonstrated by San Francisco in its *Officers for Justice* Case, the adverse impact and quota rules have an even more devastating impact at the promotional level of the police department. As these rules are being currently applied in the San Francisco police department, they have a severe effect on those persons who have chosen to make a career of police work. Many of them have spent years preparing for promotional examinations only to be frustrated by learning that promotions in the future and under quota orders will be made on the basis of factor which bear no legitimate relationship to their merit within a civil service system. The detriment to the public is patent.

As can be seen from these facts there has been a substantial, severe, and pervasive displacement of San Francisco's Charter-mandated employment selection procedures which have never been proved to be racially biased or otherwise unconstitutional. Thus, the resolution of the Los Angeles case involving some similar facts will directly affect the *Officers for Justice* case which is scheduled for trial on October 24, 1978, as well as future possible litigation in the promotive ranks of the fire department.

OVERVIEW OF CITY'S ARGUMENT

The Petition for Writ of Certiorari ably and thoroughly analyzes all the issues posed in this case except one. It is the purpose of this Amicus Curiae brief to suggest to this Court a resolution of the constitutional issues posed in the instant case which will provide principles to guide employment selection litigation involving states and their subdivisions, both n §1981 and §1983 cases as well as in Title VII litigation.

As explained in detail below, the case involving only public employers whose employee selection procedures are subject to the Equal Protection Clause. The only rational accommodation of the conflict between Congress' enforcement power under Section 5 of the Fourteenth Amendment (or its commerce clause powers) and the concept of state sovereignty embodied in the Tenth Amendment is to conclude that in the context of state and local employers Congress may proscribe and provide remedies for practices which amount to constitutional violations. However, Congress may not go farther by regulating what are constitutional employment practices because such regulations invade essential state and local functions which are reserved by the Constitution to the states.

San Francisco suggests to this Court an additional and more constitutionally thorough ground in support of the conclusion that the "adverse impact" standard applied by the trial court and upheld by the Ninth Circuit is constitutionally unsound. It is San Francisco's contention that the adverse impact standard as a basis

for a *prima facie* case challenging employment selection examinations of state and local government employers both exceeds the constitutional standards articulated by this Court in *Washington v. Davis*, 426 U.S. 229 (1976) and violates the sovereignty of the State of California and its political subdivisions by interfering with and displacing employment selection procedures where there has been no showing of a violation of the Fourteenth Amendment. The manner in which a local government selects its employees is as much an attribute of state sovereignty as are the wages and working conditions of those employees. Thus to the extent Congress, the EEOC,⁴ and the Federal courts⁵ have proscribed and provided remedies for employment selection procedures of local governmental entities which do not violate the Fourteenth Amendment, they have overstepped the bounds of state sovereignty recently reaffirmed by this Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976).

The resolution of the issues presented by San Francisco in this case merits particular attention because since the filing of the firefighter cases in Los Angeles and San Francisco, Congress amended Title VII to extend its application to state and local governments.⁶ It is therefore likely that all future litigation will be premised on Title VII in addition to §§1981 and 1983. The adverse impact standard relied on by the trial court

4. See *United States v. Solomon*, 419 F.Supp. 358, 367 (1976) applying principles of the Tenth Amendment to Federal executive action interfering with state sovereign functions.

5. See *Dauids v. Akers*, 549 F.2d 120, 127 (9th Cir. 1977).

6. See Pub.L. 92-261 §2(3), effective March 24, 1972.

and the Ninth Circuit is derived from Title VII cases involving private employers.⁷ Thus, it becomes clear that this case cries out for a specification of the line of demarcation between Congressional power pursuant to Section 5 of the Fourteenth Amendment and its authority pursuant to the Commerce Clause, on the one hand, and the sovereign prerogative of states to adopt and implement employment procedures which do not violate the Fourteenth Amendment on the other.⁸

The single most important factual material governing the resolution of the Constitutional issues in this case lies in the finding of the trial court:

"Neither Defendants nor their officials engaged in employment practices with a willful or conscious purpose of excluding blacks and Mexican-Americans from employment at the Los Angeles County Fire Department. *To the contrary, several of defendants officially engaged in efforts to increase the minority representation in the Los Angeles County Fire Department.*" (Emphasis added.) (See Petition for Writ of Certiorari, Appendix D, p. 4.)

Very similar findings were made regarding San Francisco's attempts to integrate its fire department in *Western Addition Community Organization v. Alioto*,

7. See *Davis v. County of Los Angeles*, 566 F.2d 1335, 1337 (Fn.4) and 1338 (9th Cir. 1977) in which the Circuit Court makes clear that it is applying the Title VII standard in the §1981 context.

8. The result may very well be that Congress, acting pursuant to the Commerce Clause may impose more rigorous standards on private employers than the Constitution allows it to impose either under the Commerce Clause or the Fourteenth Amendment on state and local governments. The relationship between the state sovereignty concept embodied in the Tenth Amendment as it relates to Congress' power under Section 5 of the Fourteenth Amendment is discussed below.

330 F.Supp. 536, 540 (N.D.Cal. 1971) and 340 F.Supp. 1351, 1356 (N.D.Cal. 1972):

"... [S]econdly, *there is no doubt that the Commission, far from entertaining any intent to racially discriminate, means well and has tried in its own way to improve minority representation in the Fire Department without impairing departmental efficiency*, including not only its earlier efforts to modify the Civil Service examination but also its separate and very helpful Fire Safety Technician program (under contract with EEOC) designed to help minority groups prepare themselves for eventual classification as H-2 Fireman." (Emphasis added.)

The findings of the trial court, both in the instant case and in *WACO* illustrate the essential controversy underlying the case. In adopting Title VII, Congress set a national goal of integration of the work force and sought to insure for vertical economic mobility of minorities who have traditionally been underrepresented in portions of the work force. This policy is substantially different from the underlying premise of the Fourteenth Amendment which is to eradicate all vestiges of officially enforced racial discrimination. Los Angeles and San Francisco, by their judicially recognized public efforts, have taken affirmative action to integrate their work force and to provide the very same employment opportunity which Congress in Title VII sought to promote. Nevertheless both cities are found to be in violation of law.

However, the realities at the local level pose substantial and concrete impediments to the swift achievement

of the goal of integration of which the national legislature is only remotely informed and with which in any case it need not deal on a day-to-day basis. First, there is a well-founded, socially desirable tradition of civil service employment founded on competitive examination designed to safeguard public service careers and to protect the public from the evils of political patronage systems. These principles are promulgated in local charters and ordinances, which public officials are bound by law to obey.⁹

The fact that these civil service examination procedures are set forth primarily in local charters, and in state constitutions is important. Should the court invalidate them and prevent their application on the basis of an adverse impact or statistical disparity, the state or local officials would have no laws to govern employment selection, and thus the whole operation would be taken over by the Federal court which does not have the facilities, the authority or the competence to select those who shall carry out the public undertaking.

Second, Los Angeles County, and San Francisco to an even greater degree, embody the traditional notion of the American melting pot. Both urban centers are

9. In the *Officers for Justice* case San Francisco will factually demonstrate that the quota hiring order has discouraged many police department personnel, especially white males, from seriously studying for promotional examinations. They feel that promotions will be made by the federal court on the basis of race rather than merit. Needless to say the public stands to suffer when its police department is directed by those who obtain promotion on the basis of non merit-oriented criteria. In completely undermining the merit system of employment and promotion, the court order has thrown the City back into the dark ages of the political patronage and spoils system by virtue of congressional mandate rather than local corruption.

communities containing an almost limitless variety of racial, cultural, ethnic, and religious groups. This lack of homogeneity makes employment selection devices almost impossible to validate empirically and guarantees adverse impact on at least one minority group every time a test is administered. The diversity of origins of our populations and the resulting wide spectrum of varied abilities, perceptions and *weltanschauungs* mean that there are almost limitless explanations for the performance of individuals and various groups. Congress, in adopting *national* legislation, is concerned about nationwide policies which may be ill-suited to urban settings such as Los Angeles and San Francisco and which do not account for the differences between those two communities or for the differences between them and other communities throughout the country.

Finally, at the local level, governments are required in attempting to integrate their work forces to deal with the demands of those groups not falling within the classes identified as the beneficiaries of Title VII integration efforts.¹⁰

All these factors strongly suggest that the Fourteenth Amendment standard is practical and well conceived. Local governments and the courts can act decisively and immediately to eliminate intentional racial discrimination. However, the more sophisticated and no less important social objectives of assuring vertical socio-economic mobility in public employment to all

10. See for example San Francisco Municipal Code Article 33 which prohibits discrimination on the basis of sexual orientation in housing, employment, and public accommodations.

segments of our society are best left to the local officials who best understand and can respond to the local problems. It is just this concept among others that the Tenth Amendment and its doctrine of State sovereignty were intended to promote.

Therefore, this whole case—and many others across this country—turns on a selection device prepared and administered in good faith and without racial or ethnic considerations which happen to result in the selection of whites at an appreciably greater rate than that for blacks and Mexican-Americans (in San Francisco Asians also passed at a higher rate). As discussed more fully below, since these facts do not constitute a constitutional violation, they may not be held to support relief pursuant to Title 42 U.S.C. §1981 for two reasons: First, Congress, in adopting §1981 sought to prohibit and provide remedies only for constitutional violations. Second, under principles of Federalism, Congress may not, either under the Commerce Clause or the Fourteenth Amendment, regulate employment selection policies and practices of states and their political subdivisions beyond prohibiting and providing remedies for those practices and policies which amount to violations of the Fourteenth Amendment.¹¹

11. This Court has refused in the past to address this question. See *Regents of the University of California v. Bakke*, — U.S. —, 98 S.Ct. 2733, 2755, Fn. 41 and *Dothard v. Rawlinson*, 433 U.S. 321, 324 Fn. 1 (1977). That this question continuously arises, and that public officials throughout the country as well as lower courts need guidance on this issue, cannot be gainsaid. At the very least this problem should be considered by this Court in its review and disposition of the issues posed in this case. Much time-consuming and costly litigation throughout this country may be avoided if this issue is resolved. For example, in 1972 there were 62,437 different units of local government in this country. *Lafayette v. Louisiana Power and Light*, — U.S. —, 98 S.Ct. 1123, 55 L.Ed.2d 364, 379 (1978).

**NATURE OF BURDEN IMPOSED ON PRIVATE
EMPLOYERS UNDER TITLE VII AND SECTION 1981
AS INTERPRETED BY THE NINTH CIRCUIT**

The federal courts have recognized that a cause of action, or a *prima facie* case for employment discrimination under Title VII, may be stated and relief may be obtained on the basis of pleading and proving that a selection device had an adverse impact on an identifiable minority. As noted above, this standard has been incorporated into §1981 cases. Thereafter, the court must invalidate that selection device unless the employer sustains his burden of demonstrating that it serves a compelling public or business purpose. In *Washington v. Davis*, 426 U.S. 229, 246-247, 48 L.Ed. 2d 597, 611-612 (1976), this Court noted:

“Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. It is necessary, in addition, that they be ‘validated’ in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question.”

(Footnotes omitted.)

See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425-426; (1975) and *Griggs v. Duke Power Co.*, 401 U.S. 424, 28 L.Ed.2d 158, 91 S.Ct. 849 (1971) in which this Court held that Title VII forbids the use of em-

ployment tests that have an adverse impact unless the employer meets, "the burden of showing that any given requirement has . . . a manifest relationship to the employment in question." *Griggs v. Duke Power Co.*, *supra* 7 at 432. The *prima facie* case requires that the plaintiff plead and prove that the selection device in question selects applicants for hire, promotion or discharge in a racial pattern significantly different from that of the pool of applicants.

And as noted in *Washington v. Davis*, *supra*, at 247:

"However this process proceeds [judicial examination of employment selection devices] it involves a more probing judicial review of and less deference to the seemingly *reasonable* acts of administrators and executives than is appropriate under the constitution where special racial impact, without discriminatory purpose is claimed." (Emphasis added.)

In other words, where the plaintiffs proceed under Title VII this Court has ruled that Congress imposed more stringent guidelines on employers than does the Constitution (as applicable to state actions).¹² Therefore, the courts under Title VII, at least in the context of testing devices, have been given broader powers to oversee, call into question, and even invalidate executive and administrative policies of employers, which

12. Some interesting discussion in the case of *General Electric Co. v. Gilbert*, 429 U.S. 125, 145 (1976) is relevant. In that case this Court noted.

"The concept of 'discrimination,' of course, was well known at the time of the enactment of Title VII, having been associated with the Fourteenth Amendment for nearly a century, and carrying with it a long history of judicial construction. When Congress makes it unlawful for an employer to 'discriminate . . . because of . . . sex . . .,' without further explanation of its meaning, we should not readily infer that it meant something different than what the concept of dis-

were not or could not be questioned on the grounds that they were arbitrary, capricious, unreasonable or "discriminatory" but rather merely because they violated a transcendental congressional policy designed to expand employment opportunities for those groups which Congress found traditionally to have been excluded even though not intentionally or irrationally.

Therefore, under Title VII the employer may administer written tests to applicants for the position of nightwatchman. That test may attempt to measure the ability of the applicant to tell time, read employment instructions, and exercise judgment relating to problems he faces on the job only if the test does not have an "adverse impact." All those types of questions seem reasonable and nonarbitrary; they are not "mere pretexts designed to effect an invidious discrimination against the members of . . ." one race. *Geduldig v. Aiello*, 417 U.S. 484, 496-497, fn. 20 (1974). However, if they have an adverse impact they may not be used unless they have been empirically validated as being job-related. This heavy burden was extended both by the trial court and the Ninth Circuit to the instant case involving a §1981 claim.

discrimination has traditionally meant, cf. *Morton v. Mancari*, 417 U.S. 535, 549 (1974); *Ozawa v. United States*, 260 U.S. 178, 193 (1922). There is surely no reason for any such inference here, see *Gemsco v. Walling*, 324 U.S. 244, 260 (1945)." (Emphasis added)

Similarly, "discrimination," has been historically tied to invidious purposes. The invocation and imposition of the compelling interest standard on a mere showing of adverse impact flies in the face of the term, "discrimination," as that word has acquired content and meaning in this country's history following the internecine war of secession.

NATURE OF CONGRESS' COMMERCE POWER

That Congress, under the Commerce Clause has plenary power over all matters relating to interstate commerce is beyond dispute. *Gibbons v. Ogden*, 9 Wheaton 1, 6 L.Ed. 23 (1824); *National Labor Rel. Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1936). See also *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964). The limits on this power are defined by the Constitution. *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465 (1976).

Thus, as to private employers engaged in interstate commerce, Congress under the Commerce Clause has the power to impose what it deems to be desirable social policy by prohibiting rational, nonarbitrary employment selection devices for the purpose of promoting employment opportunity. In other words, even if a selection device is reasonable, Congress may prohibit a private employer from using it if it happens to have an adverse impact on a group identified under 42 U.S.C. 2000(e), *et seq.*, (i.e., race, color, religion, sex, or national origin) (Cf. San Francisco Municipal Code Article 33 above) unless the employer can establish that the device serves some compelling business purpose or has been empirically validated. In litigation, once the *prima facie* case is pleaded and proved by the plaintiffs, the burden of proof of justification (and the correlative risk of nonpersuasion) shifts to the defendant. That is, on the mere showing that the selection device, without regard to its rationality, results in some adverse impact on any group identified in Title

VII, the employer in showing empirical validation must establish a compelling business purpose.

The compelling business purpose gauntlet is strikingly similar in both substance and effect to the compelling interest basis of review. It is, as a practical matter, impossible for employers to preserve their business-related policies. Once a compelling interest standard or the compelling business standard comes into play, the courts employ the "strict scrutiny" standard of review. The history of "fundamental interest" and "suspect class" cases demonstrates the devastating effect judicial intervention can have on legitimate governmental and business interests. The irony of judicial imposition of the standard is manifest. The court does not tell an employer what he may do, only that a particular device fails to pass muster under the extant compelling interest (i.e., empirical validation) standard. The judiciary, then, has the best of both worlds. Courts are given the extraordinary review and veto powers over the other branches of government; however, they are not responsible for finding solutions to the problems undertaken by other branches of government. Nor are they accountable to the people for the failure of these branches to provide effective solutions to the intractable social problems with which they are faced. In this context one is reminded of the aphoristic admonition of Judge Van Graafeiland: "A federal judge rearranging a state's penal or educational system is like a man feeding candy to his grandchild. He derives a great deal of personal satisfaction from it and has no responsibility for the results." *McRedmond*

v. Wilson, 533 F.2d 757, 766 (1976), (Van Graafeiland dissenting).¹³

**LIMITATIONS ON CONGRESS' POWER IMPLICIT
IN THE CONCEPT OF STATES' SOVEREIGNTY
SET FORTH IN THE TENTH AMENDMENT**

The question then is whether the standard, as articulated in the EEOC guidelines and applied to private employers by the Supreme Court in *Griggs*, *Albemarle*, and other cases, may constitutionally be applied to a

13. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 499 (1975), Mr. Justice Blackman in his concurring opinion recognized this problem when he stated,

"I cannot join, however, in the Court's apparent view that absolute compliance with the EEOC Guidelines is a sine qua non of pre-employment test validation. The Guidelines, of course, deserve that deference normally due agency statements based on agency experience and expertise. Nevertheless, the Guidelines in question have never been subjected to the test of adversary comment. Nor are the theories on which the Guidelines are based beyond dispute. The simple truth is that pre-employment tests, like most attempts to predict the future, will never be completely accurate. We should bear in mind that *pre-employment testing, so long as it is fairly related to the job skills or work characteristics desired, possesses the potential of being an effective weapon in protecting equal employment opportunity* because it has a unique capacity to measure all applicants objectively on a standardized basis. I fear that a too-rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII." (Emphasis added.)

Mr. Justice Blackman clearly understands the threat to the civil service merit system posed by quota hiring. And in fact, in the public context, the result is a paradox. The public employer who cannot afford to prepare or simply does not succeed in developing an empirically validated selection device is exposed to potential liability for violation of §1981 or Title VII. He may not respond by adopting a "quota system" because such a solution would violate the Equal Protection clause and expose him to liability to the applicant who does not meet the racial qualification. *Bakke*, *supra*. Federal courts, however, have taken it upon themselves to impose quotas on public employers like Los Angeles where there has been no showing of discrimination. How the judicial branch of the federal government claims entitlement to impose quotas, a device which under due process and equal protection no other branch of state or federal government may use is at the very least difficult to understand. In any case, the result in this case was that Los Angeles' time-tested, fairly applied personnel procedures were abrogated by the federal court which compelled that employment selection decisions be made on a statistical rather than a merit basis.

municipality in light of the principle of Federalism recently mentioned and applied by this Court in *National League of Cities v. Usery*, *supra*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed. 245 (1976). In that case, the National League of Cities and individual state and local governmental entities brought an action challenging the validity of the 1974 amendments to Fair Labor Standards Act, which extended the minimum wage and maximum hour provisions to almost all employees of states and their political subdivisions.¹⁴

The court noted the central issue in *Cities* at 426 U.S. 837, 96 S.Ct. 2467,

"The gist of their complaint was not that the conditions of employment of such public employees were beyond the scope of the commerce power had those employees been employed in the private sector but that the established constitutional doctrine of intergovernmental immunity consistently recognized in a long series of our cases affirmatively prevented the exercise of this authority in the manner which Congress chose in the 1974 amendments."

In the instant case, it must be noted first that Title VII, insofar as it was applied to public employers, was adopted pursuant to the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Congress's power to act under the Fourteenth Amendment vis a vis state government is broader than its power to act

14. The original Fair Labor Standards Act passed in 1938 specifically exempted states and their political subdivisions from its coverage. 29 U.S.C. §203d (1940 ed.).

pursuant to the Commerce Clause.¹⁵ However, there are limits to that power and it is the purpose of this analysis to suggest that in the area of employment selection those limits are defined by the Fourteenth Amendment.

The gist of San Francisco's contention in the instant case is that, except to the extent that Los Angeles's employment selection procedures violate the provisions of the Fourteenth Amendment, those employment selection procedures are beyond the scope of Congressional power to implement the Fourteenth Amendment because of the established constitutional doctrine recognized in many cases of the United States Supreme Court including the most recent decision of *National League of Cities v. Usery*, *supra*.

Initially, the pertinent statutory regulations must be reviewed in order to determine what regulations are sought to be imposed. This analysis must begin by reference to Title VII and related statutes. Title VII is codified in Title 42, §2000e *et seq.* The basic prohibitions relevant to this case are set forth in Title 42, §2000e-2 (a) (1) which provides,

“(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation,

15. See for example *Christensen & Charleston School District* 558 F.2d 1169, 1171-1172 (1972) (4th Cir.) upholding the validity of the Equal Pay Act as an exercise of Congressional power pursuant to Section 5 of the Fourteenth Amendment. But see *Usery v. Owensboro-Daviess Co. Hospital* 423 F. Supp. 843, 845-846 (W.D. Ky) (1976). (Cities controlling an issue of application of Equal Pay Act to States.)

terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or . . .”¹⁶

The key language is the prohibition against failing or refusing to hire or discharge an employee or otherwise discriminating on the basis of race, color, religion, sex or national origin. Cognate prohibitory language is applied by §2000e-2 and other subsections to employment agency practices (b), labor organization practices (c) and training programs (d). See also §2000e-3. However, the critical term in Title VII is “discriminate” in terms of race, color, religion, sex, and national origin.

§1607.3 of the EEOC guidelines defines discrimination as follows:

“The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by Title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility as hereinafter described, and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use.” (Emphasis added.)

The standards set forth in these guidelines have already been adopted by courts as applicable to private employers and subsequently extended in §1981 cases

16. In 1972 the Civil Rights Act of 1964 was amended by Equal Employment Opportunity Act, extending Title VII coverage to state and local government employees.

to public employers. See *Griggs v. Duke Power Co.*, *supra*, *Albemarle Paper Co. v. Moody*, *supra*.

However, the initial legislation was sought to be imposed on employers in private industry. Pursuant to its powers under the Commerce Clause, Congress has plenary power to regulate interstate commerce. Therefore, a selection procedure which *appears reasonable and has been effectively and in good faith used in the past* may be rendered unacceptable because Congress has articulated as a paramount goal, the "equalization" of employment opportunities in interstate commerce. In other words, Congress¹⁷ has declared as a matter of policy that otherwise rational, fairly applied and well-accepted employment selection practices may not be used if those devices operate against certain identifiable minorities to a greater extent than they operate against the majority population unless those devices have been empirically validated as being job related or in some other way are shown to serve a compelling public purpose and *no other alternative exists*.¹⁸ This policy, in essence, reverses the normal burden of proof.

Once a *prima facie* case is stated, the selection device falls, absent evidence of empirical validation or a com-

17. It is not certain, at all, whether Congress, in using the term, "discriminate," in its prohibition, really intended to go so far as EEOC has gone in its guidelines.

18. This principle was explained in *Albemarle Paper Co. v. Moody*, *supra*, 422 U.S. 405, 425. After discussing what constitutes a *prima facie* case and how an employer may defend by showing that the test is job related, this Court made clear just how far the Congressional policy goes when it stated,

"If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable

pulling business purpose and absent a showing that no alternative, less "discriminatory" device exists. The rejected applicant need not show the selection device to be arbitrary or unreasonable—he or she need only show the adverse impact. The question here is whether that policy may be imposed upon the states.

EQUAL PROTECTION CLAUSE IN EMPLOYMENT DISCRIMINATION CONTEXT

In *Washington v. Davis*, *supra*, 426 U.S. 229 (1976) the United States Supreme Court ruled on a case involving two individuals whose applications to become police officers in Washington, D.C., had been rejected. They brought action pursuant to 42 U.S.C. 1981 (at the time they brought their action, Title VII had not yet been extended to governmental employers such as the District of Columbia). The plaintiffs had contended that the written examination bore no reasonable relationship to job performance and excluded a disproportionately high number of black applicants. The trial court first noted the absence of any claim of intentional discrimination. (Likewise in the instant case the trial court, as noted above, specifically found that

racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' Such a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination." (Citations omitted)

If this standard were applied to states, not only would the adverse impact rule upset the presumption of validity accorded by Federal courts reviewing state actions under the Fourteenth Amendment, *McGowan v. Maryland*, 366 U.S. 420 (1960) but it would also upset the normal deference arising from both the Federalist nature of our system and from the doctrine of separation of powers pursuant to which Federal courts refrain from substituting their judgment for that of the states or striking down a state policy because it does not operate with absolute mathematical nicety. *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 65 (1910)

there was no intentional discrimination on the basis of race.) The plaintiffs' claim centered on the arbitrary nature of the selection device, by virtue of its adverse impact of on the members' class caused by its application.

Initially this Court noted in *Washington v. Davis*, 426 U.S. 229, 240, 96 S.Ct. 2040, 2047,

"The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."

Then this Court concluded at 426 U.S. 242 96 S.Ct. pp. 2048-2049,

"Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact—in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires—may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is

very difficult to explain on nonracial grounds. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. *Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964), that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." (Emphasis added.)

This Court discussed the policy implication of the *Davis* case at 422 U.S. 242, 245-246, 96 S.Ct. 2040, 2050,

"Both before and after *Palmer v. Thompson*, however, various Courts of Appeals have held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications. The cases impressively demonstrate that there is another side to the issue; but, with all due respect, to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement. As

an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups. Had respondents, along with all others who had failed Test 21, whether white or black, brought an action claiming that the test denied each of them equal protection of the laws as compared with those who had passed with high enough scores to qualify them as police recruits, it is most unlikely that their challenge would have been sustained. *Test 21, which is administered generally to prospective government employees, concedely seeks to ascertain whether those who take it have acquired a particular level of verbal skill; and it is untenable that the Constitution prevents the government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing.* Respondents, as Negroes, could no more successfully claim that the test denied them equal protection than could white applicants who also failed. The conclusion would not be different in the face of proof that more Negroes than whites had been disqualified by Test 21. That other Negroes also failed to score well would, alone, not demonstrate that respondents individually were being denied equal protection of the laws by the application of an otherwise valid qualifying test being administered to prospective police recruits. Nor on the facts of the case before us

would the disproportionate impact of Test 21 warrant the conclusion that it is a purposeful device to discriminate against Negroes and hence an infringement of the constitutional rights of respondents as well as other black applicants. *As we have said, the test is neutral on its face and rationally may be said to serve a purpose the government is constitutionally empowered to pursue.* Even agreeing with the District Court that the differential racial effect of Test 21 called for further inquiry, we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated and inference that the Department discriminated on the basis of race or that a 'police officer qualifies on the color of his skin rather than ability.'" 348 F. Supp., at 18. (Footnote omitted.) (Emphasis added.)

And then this Court compared the *Davis* case with Title VII at 426 U.S. 229, 247-247 96 S.Ct. 2040, 2051,

"Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. It is necessary, in addition, that they be 'validated' in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability or potential necessary for the position at issue and determining whether the

qualifying tests are appropriate for the selection of qualified applicants for the job in question. *However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and the Fourteenth Amendments in cases such as this.*" (Emphasis added.) (Footnote omitted.)

The question then is whether the trial court applied the proper standard of review in evaluating the selection procedure of the Los Angeles County Fire Department. If the *Griggs* selection criteria taken from Title VII guidelines are applicable, then the plaintiffs made out a *prima facie* violation.

LIMITS OF CONGRESS' POWER SET FORTH IN THE CONSTITUTION THE DOCTRINE OF STATE SOVEREIGNTY

It is submitted that §1981, to the extent that it is read to go beyond prohibiting and providing remedies for constitutional violations is unconstitutional as applied to the states and political subdivisions thereof.

This contention is based on *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, *supra*. In the *Usery* case the plaintiffs had challenged amendments to the Fair Labor Standards Act extending the Act's coverage to state and local government employers, including states and political subdivisions thereof.

(See 29 U.S.C. §§213a and 2034.) These amendments parallel the amendments of 1972 to Title VII extending that Act's coverage to public employers. The governmental entities contended that the amendments extending the minimum wage and maximum hour requirements to them as state and local government employers would intrude upon the state's performance of an essential governmental function.

It is contended in the instant case that the application of Title VII standards, to the extent that they go beyond requiring the states to comply with the Fourteenth Amendment, intrudes upon Los Angeles's performance of an essential governmental function by preventing Los Angeles from using rational, generally acceptable employment selection procedures to obtain the best qualified civil servants in its fire department, a traditional government operation.

With regard to the issue of the power of the Congress to regulate interstate commerce, this Court in *Usery* stated at 96 S.Ct. 2468-2469,

"It is established beyond per adventure that the Commerce Clause of Art. I of the Constitution is a grant of plenary authority to Congress. That authority is, in the words of Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1, 6 L.Ed. 23 (1824), ' . . . the power to regulate; that is to prescribe the rule by which commerce is to be governed.' *Id.*, at 196. When considering the validity of asserted applications of this power to wholly private activity, the Court has made it clear that '[e]ven activity that is purely intrastate in character may be regulated by Congress, where the

activity combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations.' *Fry v. United States*, 421 U.S. 542, 547, 95 S.Ct. 1792, 1795, 44 L.Ed.2d 363 (1975). Congressional power over areas of private endeavor, even when its exercise may preempt express state law determinations contrary to the result which has commended itself to collective wisdom of Congress, has been held to be limited only by the requirement that 'the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution.' " *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262, 85 S.Ct. 348, 360, 13 L.Ed.2d 258 (1964).

Similarly, Congress' powers pursuant to the Fourteenth Amendment to regulate, prohibit, and provide remedies for constitutional violations is broad.

In fact, in *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 10 L.Ed.2d 828 (1965), the Supreme Court held that under §5 of the Fourteenth Amendment Congress had the power to pass appropriate legislation to implement the dictates of the Equal Protection Clause and to adopt implementing legislation which may, under very limited circumstances as discussed below, reach more broadly than the Equal Protection Clause itself.¹⁹ Therefore, in *Katzenbach v. Morgan*, *supra*, this Court upheld that portion of the 1965 Voting Rights Act which provided that no person who had successfully completed the sixth primary grade in a public school or in a private school accredited by the

19. Section 5 of the Fourteenth Amendment provides, "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

Commonwealth of Puerto Rico in which the language of instruction was other than English could be denied the right to vote in any election because of his inability to read or write English.²⁰

New York City had objected to this legislation on the grounds that New York election laws had a literacy requirement which had not been shown to be a pretext for unconstitutional denial of the right to vote. The court based its decision on §5 of the Fourteenth Amendment and on the Commerce and Supremacy Clauses.

In *Bakke*, *supra*, this Court eschewed the very question San Francisco is posing herein when it stated, at 98 S.Ct. 2755, fn. 41,

"Furthermore, we are not here presented with an occasion to review legislation by Congress pursuant to its powers under Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment to remedy the effects of prior discrimination. *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). *We have previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures.* (Emphasis added.)

It is clear then that the extraordinary Congressional powers affirmed by this Court in *Morgan*, *supra*, must be based on special findings.

The "special findings" of Congress referred to above

20. See 79 Stats. 439, 42 U.S.C. 1973b.

were discussed in *Morgan, supra*, at 384 U.S. 652. Relying on the legislative history of the Voting Rights Act of 1965, this Court noted that the legislation was specially tailored to a specific ethnic group (Puerto Ricans) who had been educated under special circumstances (American Flag schools) in a United States territory and who had subsequently migrated to the United States. In the Congressional hearings, the special thrust of this legislation was discussed at length. See 384 U.S. 645, fn. 3. It is clear under these special circumstances that Congress could have concluded that it would be a denial of equal protection not to allow citizens to vote who had been educated in American Flag schools.

In contrast, the legislative history preceding the extension of Title VII to state and local governments demonstrates no special Congressional attention for an insular minority. There is in the legislation no special finding or declaration of policy. A review of the legislative history (see H.R. 92-238, appearing in U.S. Code Cong. and Admin. News, 1972, v. 2, p. 2152, *et seq.*) indicates that there is a general public problem of employment discrimination in state and local governments. However, the report on which the Committee relied, indicates that each community in this country faces special and unique problems; and, indeed, the report notes many instances wherein state and local governments had made substantial progress in the area of equalization of employment opportunities. (See U.S. Civil Rights Commission, "For All the People . . . By All the People, a Report on Equal Opportunity in

State and Local Government," July, 1969.)

It becomes clear upon a reading of that report, that there was no basis for a Congressional finding that a nationwide, blanket rule more stringent than the Equal Protection Clause of the Fourteenth Amendment was necessary or even desirable. Absent a clear specification of intent, this Court should be extremely reluctant to attribute to Congress either the desire to go beyond prohibiting and providing remedies for Fourteenth Amendment violations or so eliminate the options of state and local government in integrating their work forces. Such a crippling of those governmental employers who have in good faith acted affirmatively to integrate their work forces flies in the face of the equal protection tradition which recognizes that out of the crucible of diverse solutions to problems great social wisdom can be drawn. As noted in *Cities*, one critical criterion in the determination as to whether a federal enactment robs the states of their sovereign powers is the extent to which the capacity of the states to solve their problems has been impaired.

The legislative history of the extension of Title VII to state and local governments therefore supports San Francisco's contention that there is no basis for the conclusion that Congress made special findings so as to justify proscriptions and remedies broader than those to be invoked under the Fourteenth Amendment.

The importance of special findings in establishing the line of demarcation between Congressional power under Section 5 of the Fourteenth Amendment and State sovereignty embodied in the Tenth Amendment

was made clear in *Oregon v. Mitchell* 400 U.S. 11, 27 L.Ed.2d 27 (1970). In that case this Court upheld that portion of the Voting Rights Act Amendments of 1970, Pub L 91-285, 85 Stat. 314, which lowered the minimum voting age in *federal* elections. However, this Court held invalid Congress's attempt in that Act to lower the minimum voter age in *state and local* elections. In announcing the judgment of this Court, Mr. Justice Black relied on the fact that

"Congress made no legislative findings that the 21-year-old vote requirement was used by the States to disenfranchise voters on account of race . . . Since Congress has attempted to invade an area preserved to the States by the Constitution without a foundation for enforcing the Civil War Amendments' ban on racial discrimination, I would hold that Congress has exceeded its powers in attempting to lower the voting age in State and local elections. On the other hand, where Congress legislates in a domain not exclusively reserved by the Constitution to the States, its enforcement power need not be tied so closely to the goal of eliminating discrimination on the basis of race." *Oregon v. Mitchell*, *supra*, 400 U.S. 112, 130, 27 L.Ed.2d 272, 284.

The *Davis* case provides an additional basis for this contention. That case, like the instant case, was filed on the basis of Title 42, §1981. In *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621 (1972) the court noted that §§2000e, *et seq.*, prohibiting "discriminatory" employment practices is parallel to §1981 though broader in that it extends to other forms of "discrimination" than racial discrimination to which §1981 is solely directed.

However, in the context of what Congress sought to do, it is persuasive that this Court in *Washington v. Davis*, *supra*, refused to conclude that Congress had gone so far in §1981 as to prohibit racial discrimination which manifests itself only in terms of adverse impact. By applying the rationale of the *Katzenbach* case this Court could have held that §1981, being implementing legislation adopted by Congress, "may reach more broadly than the Equal Protection Clause itself." Therefore, the Court refused in the *Davis* case to expand the definition of "discrimination" even in a context where the constitutional limits of federalism would have imposed no barriers (District of Columbia being subject to the exclusive jurisdiction and control of the Congress). It is submitted that if the Court refused to give an expanded definition to "discrimination" in *Davis*, then it necessarily follows that this Court should be doubly reluctant to accept such an expanded definition of the term when, in addition to the limitations in terms of what the drafters of the Fourteenth Amendment sought to proscribe,²¹ there is the affirmative constitutional constraint on the power of Congress to regulate the sovereign functions of the state.

Therefore, it must be concluded that the powers of Congress to adopt legislation pursuant to §5 of the Fourteenth Amendment is similar to the power of Con-

21. It is recognized that §1981 was adopted initially in the Civil Rights Bill of April 9, 1866, C. 31, §1, 14 Stat. 27 pursuant to the power invested in Congress by §2 of the Thirteenth Amendment, "... to enforce this article by appropriate legislation." *Ex parte Riggins*, 134 F.404 (1904) reversed on other grounds 199 U.S. 547, 50 L.Ed. 303. However, since Congress was vested with the same power under §2 of the Thirteenth Amendment as it was under §5 of the Fourteenth Amendment, the argument based on *Washington v. Davis*, is persuasive.

gress to adopt legislation pursuant to the Commerce Clause. Just as in the Commerce Clause cases, Congress has plenary power to regulate activities if those activities may have an effect on interstate commerce; so too, under the Fourteenth Amendment, Congress may regulate activities which may, in and of themselves, not constitute a denial in equal protection of laws if such regulations further the purpose of securing equal protection of the laws for disadvantaged citizens.²²

However, in *Usery* this Court noted that there were limits to Congress' power under the Commerce Clause. Said this Court at 426 U.S. 833, 840-844, 96 S.Ct. 2469-2471,

"Appellants in no way challenge these decisions establishing the breadth of authority granted Congress under the commerce power. *Their contention, on the contrary, is that when Congress seeks to regulate directly the activities of States as public employers, it transgresses an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations contained in the Constitution. Congressional enactments which may be fully within the grant of legislative authority contained in the Commerce Clause may nonetheless be invalid because found to offend against the right to trial by jury contained in the Sixth Amendment, United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), or the Due Process Clause of the Fifth Amendment, Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532,*

22. What device could more effectively secure for citizens educated in American flag schools their constitutional right to equal protection of the laws than the opportunity to participate in selecting the law makers and otherwise participating in the electoral process. See *Katzenbach v. Morgan, supra*.

23 L.Ed.2d 57 (1969). Appellants' essential contention is that the 1974 amendments to the Act, while undoubtedly within the scope of the Commerce Clause, encounter a similar constitutional barrier because they are to be applied directly to the States and subdivisions of States as employers. This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution . . . In *Fry, supra*, the Court recognized that an express declaration of this limitation is found in the Tenth Amendment: 'While the Tenth Amendment has been characterized as a "truism," stating merely that 'all is retained which has not been surrendered,' *United States v. Darby*, 312 U.S. 100, 124, 61 S.Ct. 451, 462, 85 L.Ed. 609 (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system . . . ' 421 U.S. at 547, 95 S.Ct., at 1795." *Id.*, at 76. (Footnotes omitted.) (Emphasis added.)

Accordingly, it cannot be doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise broad²³ power to enforce the Fourteenth Amendment. That this limit exists was thoroughly discussed in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). In that case this Court recognized that since the Fourteenth Amend-

23. No case has been uncovered which describes the power of Congress under §5 of the Fourteenth Amendment as "plenary."

ment was in the Constitution it must be read as a compromise of state and local governmental prerogatives (in that case the Eleventh Amendment was involved). The only way to give content and meaning to both the Equal Protection Clause of the Constitution and the concept of Federalism embodied in the Tenth Amendment is by concluding that Congress may "invade" what otherwise might have been within the ambit of state prerogative when it seeks to proscribe and provide remedies for constitutional violations. Conversely, Congress may not exact from states adherence in their employment selection procedures to standards which go beyond those in the Constitution. A reading of the Fourteenth Amendment as authorizing Congressional action directed at non-constitutional discrimination would accord to it more constitutional significance than its drafters intended. There is no indication that the Fourteenth Amendment was intended to go beyond abolishing racial and other forms of discriminatory prejudice. It must be concluded that the federal system of government imposes definite limits on the authority of Congress to regulate the activities of states by means of the power vested in it by §5 of the Fourteenth Amendment. The question here is whether §1981 has been unconstitutionally applied to states and their subdivisions as employers. The concept of federalism in our Constitution also incorporates the Fourteenth Amendment which imposes specific prohibitions on the states as states. If the federal nature of our system is to retain any of its viability, the power of Congress in §5 of the Fourteenth Amendment must be

limited to prohibiting, and providing remedies for, violations of the Fourteenth Amendment when the regulations impinge upon the state's exercise of its sovereign functions.

This Court in *Usery* noted at 426 U.S. 844-845, 96 S.Ct. 2471,

"In *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 46 S.Ct. 172, 70 L.Ed. 384 (1926), the Court likewise observed that 'neither government may destroy the other nor curtail in any substantial manner the exercise of its powers.' *Id.*, at 523, 46 S.Ct., at 174.

"Appellee Secretary argues that the cases in which this Court has upheld sweeping exercises of authority by Congress, even though those exercises pre-empted state regulation of the private sector, have already curtailed the sovereignty of the States quite as much as the 1974 amendments to the Fair Labor Standards Act. We do not agree. *It is one thing to recognize the authority of Congress to enact laws regulating individual business necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.*" 221 U.S., at 565, 31 S.Ct., at 689." (Emphasis added.)

Therefore, it is submitted that §1981, to the extent it is read to extend beyond prohibiting and providing remedies for constitutional violations, is not invalid because of a lack of an affirmative grant of legislative authority, but because the Constitution prohibits Congress from exercising its power to impair exercises of sovereign powers by the States. The Fourteenth Amendment did indeed compromise the "sovereignty" of the states *but only* to the extent that it imposed limitations on the power of the several states tantamount to the Bill of Rights with the addition of the Equal Protection concept.²⁴ In *Usery* this Court noted at page 845,

"One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours these persons will work, and what compensation will be provided where these employees may be called upon to work overtime. The question we must resolve in this case, then, is whether these determinations are 'functions essential to separate and independent existence.' *Coyle v. Smith, supra*, at 580, 31 S.Ct., at 695, quoting from *Lane County v. Oregon, supra*, 7 Wall. at 76, 'so that Congress may not abrogate the State's otherwise plenary authority to make them.' "

It is clear that selection criteria for determining who shall be governmental employees to carry out the public business are undisputed attributes of sovereignty. The

24. Indeed the Due Process Clause of the Fifth Amendment has been held to impose on the federal government the same restrictions articulated in the Equal Protection Clause, *Bolling v. Sharp* 347 U.S. 497, *supra*.

question, then, is whether the state's power to determine criteria for employee selection and dismissal are "functions essential to the separate and independent [state] existence . . ."²⁵

One factor noted in *Usery* in determining whether the legislation violated the sovereignty of the states was the substantial increase in costs to the states if the minimum wage and maximum hours limitations were applicable. The §1981 limitations applied by the trial court and by the Ninth Circuit require municipalities to forego time-tested and rational selection procedures thereby resulting in increased personnel costs incident to training and dismissing employees who fail to perform satisfactorily for reasons which could have been predicted based the rejected criteria.²⁶ Furthermore, there are less easily measurable, but certainly significant costs to the public in terms of not having the best qualified people to do the job. In addition, Los Angeles' services may be impaired and the County could be exposed to liability for actions or failures to act which also could have been predicted and avoided but for the §1981 limitations.^{27 28} One important consideration, implicit in a reasonably conceived employee selec-

25. Just as this Court in *Usery* undoubtedly would have upheld legislation prohibiting a pay scale which gave higher wages to whites than non-whites, likewise, in the instant case it is conceded that Congress may prohibit and provide remedies for state governmental employment selection procedures which deny equal protection of the laws.

26. Whereas the employment examination held invalid by the trial court in the instant case was based on some rational attempt to select the most qualified applicants for the position of firefighters, the quota hiring order, following a determination of adverse impact, is based exclusively on statistical, racial criteria and does not even purport to select the most qualified applicant for the job.

27. As noted, Title VII as written by Congress merely prohibits "discrimination." However, what is being applied are the guidelines developed by EEOC from a reading of the legislation. That EEOC may have gone

tion examination, is the need for efficient, cost-effective employees. To the extent Congress (or the EEOC) supplants the power to make determinations of how best to measure efficiency and effectiveness, it necessarily follows that the cost of delivering the governmental services will be increased and, correlatively the quality of the product will decline.²⁹ That one can at best only speculate on these costs speaks³⁰ cogently for a conclusion that Congress should not regulate in the area beyond prohibiting and providing remedies for constitutional violations.

Empirical validation as contemplated by the EEOC guidelines is an extremely costly and time-consuming

beyond what was legitimately intended by Congress to constitute "discrimination" is a powerful question. See *General Electric v. Gilbert*, *supra*.

28. California Civil Code §§2100-2104, for example, impose special duties on common carriers who are held to the duty of utmost care and diligence to the public. *Fisher v. Southern Pacific Railroad Co.*, 89 Cal. 399, 26 P. 894. Common carriers can be held responsible for any, even the slightest, negligence, and are required to do all that human care, vigilance and foresight reasonably can do under all the circumstances. *Acosta v. Southern Calif. Rapid Transit Dist.*, 2 Cal.3d 19, 84 Cal.Rptr. 184, 465 P.2d 72. If a municipality seeking to select bus drivers gets caught up in the nightmare of the adverse impact—empirical validation labyrinth, it very well may give up and submit to a consent decree pursuant to which employees are selected on the basis of racial roulette. Clearly it is less likely that chance will give the municipality bus drivers who will meet these standards. That Los Angeles should be required to select its future firefighters on such a basis is to deny, on the basis of hypertechnical constitutional casuistry, the very foundations of organized social order and the social contract.

29. In light of Proposition 13, amending the California Constitution and limiting the powers of local governments to raise revenues, the cost of delivery of governmental services becomes a predominant consideration to the County of Los Angeles.

30. Another clear increased personnel cost would be the expense of conducting validation studies which would pass muster under the EEOC empirical validation guidelines. In addition, if the municipality succeeds in passing this hurdle it must still anticipate and respond to the potential claim that there are other equally effective selection devices which would not have a disparate impact and which therefore should be used. The rejection of a validated selection device in such a case would add waste onto increased cost.

undertaking when it is at all possible.^{30a} With most job categories the number of appointees is so small as to provide no reliable basis for an empirical validation study.

Then this Court in *Usery* went on to discuss other factors which weigh in determination as to whether the state's sovereignty has been invaded. Said this Court at 426 U.S. 833, 847-8452 S.Ct. 2465, 2472-2473,

"Quite apart from the substantial costs imposed upon the States and their political subdivisions, the Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require. The Act, speaking directly to the States *qua* States, requires that they shall pay all but an extremely limited minority of their employees the minimum wage rates currently chosen by Congress. It may well be that as a matter of economic policy it would be desirable that States, just as private employers, comply with these minimum wage requirements. But it cannot be gainsaid that *the federal requirement directly supplants the considered policy choices of the States' elected officials and administrators* as to how they wish to structure pay scales in state employment . . . The only 'discretion' left to them under the Act is either to attempt to increase their revenue to meet the additional financial burden imposed upon them by paying congressionally prescribed wages to their existing complement of employees, or to reduce that

30a. The U.S. Civil Rights Commission itself has recognized that "[t]est validation is a complicated, expensive, and time-consuming operation under the best of circumstances" and "is even more difficult" in "a traditional civil service system." "For All the People . . . By All the People," *supra*.

complement to a number which can be paid the federal minimum wage without increasing revenue.

"This dilemma presented by the minimum wage restrictions may seem not immediately different from that faced by private employers . . . The difference, however, is that a State is not merely a factor in the 'shifting economic arrangements' of the private sector of the economy. *Kovacs v. Cooper*, 336 U.S. 77, 95, 69 S.Ct. 448, 458, 93 L.Ed. 513 (1949) (Frankfurter, J., concurring), but is itself a coordinate element in the system established by the framers for governing our federal union.

"The degree to which the FLSA amendments would interfere with traditional aspects of state sovereignty can be seen even more clearly upon examining the overtime requirements of the Act . . . We do not doubt that this may be a salutary result, and that it has a sufficiently rational relationship to commerce to validate the application of the overtime provisions to private employers. But, like the minimum wage provisions, the vice of the Act as sought to be applied here is that it directly penalizes the States for choosing to hire governmental employees on terms different from those which Congress has sought to impose.

"This congressionally imposed displacement of state decisions may substantially restructure traditional ways in which the local governments arranged their affairs . . . Our examination of the effect of the 1974 amendments, as sought to be extended to the States and their political subdivisions, satisfies us that both the minimum wage and the maximum hour provisions will impermis-

sibly interfere with the integral governmental functions of these bodies . . . their application will nonetheless significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection . . . These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their system for performance of these functions must rest, we think there would be little left of the States' separate and independent existence.' . . . This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, §8, cl. 3." (Footnotes omitted.) (Emphasis added.)

Similarly, the application of Title VII standards in the context of the instant case "displaces state policies regarding the manner in which they select those charged with the responsibility for the 'delivery of these governmental services which the citizens require.' "

Likewise, "It may well be that as a matter of . . . [social] policy it would be desirable that states, just as

private employers, comply with . . . [Title VII adverse impact standards]. But it cannot be gainsaid that the federal requirement directly supplants the considered policy choices of the states' elected officials and administrators as to how they wish to structure . . . [employment selection criteria] in state employment." As a practical matter, the state is left with no real choice. The local government may stop using the time-tested employee selection device as a selection criterion and start selecting its employees on the basis of race, or it may abandon the public undertaking.

In a similar manner, "This congressionally imposed displacement of state decisions [relating to selection criteria] may substantially restructure traditional ways in which local governments have arranged their affairs" by nullifying the civil service merit system based on competitive examinations. And it can only be concluded that the trial court's incorporation of Title VII standards into this Section 1981 case, to the extent that that incorporation attempts to extend beyond prohibiting and providing remedies for constitutional violations, significantly alters and displaces local governments' ability to select those persons most qualified to perform services in such traditional governmental functions as fire protection and police protection. If the "adverse impact" rule is allowed to be applied to such an integral operation as employee selection, then there will be little left of the states' "separate and independent existence." And clearly the regulation in question would impair the states' "ability to function effectively within a federal system."

Lying behind this principle is the Supreme Court's conception of the Fourteenth Amendment, its purport and intent, its scope and potency. The judiciary does not view the Fourteenth Amendment as a tool which enables the federal courts under the guise of the equal protection to control the administration of governments by the states. *Younger v. Harris*, 401 U.S. 37, 44 (1971). See also *Oregon v. Mitchell*, *supra*, at 400 U.S. 112, 126-127, 27 L.Ed.2d 272, 287 (1971) where Mr. Justice Black stated,

"While this Court has recognized that the Equal Protection Clause of the Fourteenth Amendment in some instances protects against discriminations other than those on account of race, . . . it cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves. The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people. On the other hand, the Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race." (Footnote and citations omitted.) *Emphasis added.*)

This decision further reinforces San Francisco's contention that this Court cannot interfere with its employment selection procedures which are an intimate part of self government. And the equal protection

standard as noted in *Washington v. Davis, supra*, is not violated by *rational* selection criteria merely because they result in some adverse impact.

CONCLUSION

If §1981 (incorporating Title VII and EEOC guidelines) violates the sovereignty of the state to the extent that it goes beyond Equal Protection Clause limitations then it is submitted that *Washington v. Davis, supra*, provides the standard for review of employment selection devices of governmental entities. *Washington v. Davis*, quoted extensively above, holds that a *prima facie* case of a Fourteenth Amendment violation may not be pleaded and proved on the basis of "adverse impact." This Court held that the plaintiff must plead and prove intent to discriminate, and that allegations and evidence of adverse impact, though acceptable as one element of a claim, do not alone make out a Fourteenth Amendment violation. In the instant case plaintiffs only pleaded and proved adverse impact. It is submitted that the trial court erred in concluding that plaintiffs had made out a *prima facie* case. Accordingly, a §1981 claim resting on proof of statistical disparity should be deemed insufficient as a matter of law.

In the instant case, the plaintiffs introduced insufficient evidence to sustain their burden of overcoming the presumption of validity that attached to the Los Angeles County examination to qualify firefighters by showing that that examination was arbitrary or that it was animated by an intent to discriminate on the basis of race. And since the standards applied by the

trial court and upheld by the Ninth Circuit constituted a pervasive and unconstitutional invasion of state prerogative, that decision of the Ninth Circuit must be reversed.

Therefore, the decision of the Ninth Circuit should be reversed and the case remanded with appropriate directions from this court.